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July 16, 2021

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: *Grafton and Upton Railroad Company – Petition for Declaratory Order,* STB Docket No. FD 36518

Dear Ms. Brown:

We attach for filing in the above-captioned proceeding the Reply of Hopedale Properties, LLC.

Thank you very much for your attention to this matter.

Sincerely,

Allison I. Fultz
Counsel for Hopedale Properties, LLC

David E. Lurie
Harley C. Racer
LURIE FRIEDMAN LLP
Counsel for Hopedale Properties, LLC

Enclosures

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BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.

STB DOCKET NO. FD 36518
GRAFTON AND UPTON RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER

REPLY OF HOPEDALE PROPERTIES, LLC

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Counsel for Hopedale Properties, LLC

Dated: July 16, 2021

BEFORE THE
SURFACE TRANSPORTATION BOARD
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STB DOCKET NO. FD 36518
GRAFTON AND UPTON RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER

REPLY OF HOPEDALE PROPERTIES, LLC

Pursuant to 49 C.F.R. § 1104.13(a) and this Board's Decision issued May 26, 2021, granting the motion of Hopedale Properties, LLC ("Hopedale Properties") to extend the time to file a Reply to July 19, 2021, Hopedale Properties hereby submits its Reply to the Petition for Declaratory Order filed by the Grafton and Upton Railroad Company ("GU") in this proceeding on May 13, 2021 (the "GU Petition"). Hopedale Properties disputes GU's claims that GU has any basis to use the threat of federal preemption of state law to occupy or damage Hopedale Properties' land, or impair Hopedale Properties' interests in its real property. The dispute in connection with GU's track and Hopedale Properties' adjacent land is solely a matter of state real property law, and Hopedale Properties has accordingly filed a complaint to address all of the relevant issues in this dispute in Massachusetts Superior Court (the "Complaint").[1] A copy of

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[1] Hopedale Properties seeks injunctive relief and damages in the Complaint as follows: (1) a declaration that Hopedale Properties holds recorded title to two deeded easements, ROW1 and ROW2 as described herein, or, in the alternative, implied easements, and an order that GU restore Hopedale Properties' unobstructed access to the easements; (2) a declaration that GU has encroached upon Hopedale Properties' non-exclusive easement rights in a right-of-way shared with GU and others designated as Right of Way B, and an order that GU restore Hopedale Properties' easement rights in full; (3) damages for GU's interference with Hopedale Properties' rights and interests in ROW1, ROW2, and Right of Way B; (4) damages for GU's trespass over ROW1, ROW2, and Right of Way B; (5) treble damages for GU's unfair and deceptive acts, including deceptive and materially misleading statements in connection with GU's application for a grant from the Commonwealth's Industrial Rail Access Program, resulting detriment to Hopedale Properties, intentional obstruction of Hopedale Properties' access to its property, and interference with Hopedale Properties' own development project; (6) damages for GU's intentional interference with Hopedale Properties' advantageous business relationships with the Town of Hopedale, Worcester Business Development Corporation, and future users and tenants of Hopedale Properties' redevelopment project on the Properties, as described herein; (7) a declaration determining the rights of the parties and establishing that fencing

… Footnote continued on next page.

Hopedale Properties' Complaint and the Exhibits relevant to this matter are attached hereto as **Exhibit A**. For all of the reasons stated herein, the Petition must be denied.

BACKGROUND

Hopedale Properties does not dispute that GU is a Class III common carrier, or that GU has the right to conduct common carrier operations over the right-of-way that bisects Hopedale Properties' parcels. Hopedale Properties, does, however, dispute that GU has any right whatsoever to interfere with Hopedale Properties' existing private at-grade crossings of GU's right-of-way, which provide essential means of access to Hopedale Properties' parcels, or to enter upon and place equipment and obstructions on Hopedale Properties' premises without leave to do so. In its Petition, GU improperly seeks to use the threat of federal preemption of Hopedale Properties' right to seek relief for these solely property-based harms in state court as a sword rather than as a shield. None of the well-defined categories of state or local regulatory actions that are subject to federal preemption in the context of common carriers subject to the jurisdiction of this Board are relevant to this matter. GU's actions have harmed Hopedale Properties and do not constitute "transportation" as defined in the Surface Transportation Board's statute. GU is not entitled to claim that federal preemption protects it against being held responsible for the damages it has caused, and this Board has no jurisdiction over the subject matter of the dispute.

Hopedale Properties and its affiliates currently own and manage approximately 77 acres of the former Draper Complex, which operated for 130 years and once housed the largest manufacturer of power looms in the United States, comprising approximately 1,800,000 square

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erected by Hopedale Properties' predecessor more than 70 years ago does not encroach on GU's property; (8) an order requiring GU to pay Hopedale Properties' reasonable costs and attorneys' fees; and (9) such other relief as the Court deems just and proper.

feet of buildings and land, made up of 163 Freedom Street, 24 Hopedale Street, 85 Freedom Street, 105 Freedom Street, 21 Lake Street, 80 Bancroft Park, 23 Hopedale Street, 52 Prospect Street, 49 Prospect Street, 7 Fitzgerald Drive, 9 Fitzgerald Drive, 6 Fitzgerald Drive, 4 Fitzgerald Drive, 32 Cemetery Street, 12 Rear Bancroft, 9 Depot Street and easements and water rights to the Mill River (collectively, the "Properties"). The major Properties are described in the Certificate of Title Report, attached to the Complaint as Exhibit 1. GU's right-of-way bisects the Properties, including separating 6 Fitzgerald Drive, 32 Cemetery Street, 4 Fitzgerald Drive, 80 Bancroft Park, and 12 Rear Bancroft Park to the southwest from the rest of Hopedale Properties' assemblage.

The key parcels of Plaintiffs' Properties and assemblage are 24 Hopedale Street and 85 Freedom Street, the site of the primary former buildings of the former Draper Complex. The only direct way to access 24 Hopedale Street and 85 Freedom Street from 6 Fitzgerald Drive and other areas of the Properties southwest of the railroad is by use of the private at-grade railroad crossing immediately to the northwest of the Mill River. *See* Complaint Exhibit 2. This right-of-Way ("ROW1") is also the only direct southern means of egress for the large 24 Hopedale Street parcel.

The only way to access 7 and 9 Fitzgerald Drive from 6 Fitzgerald Drive is by the private at-grade railroad crossing immediately to the east of the Mill River ("ROW2"). *See* Complaint Exhibit 2. This ROW2 is accessed by crossing a bridge over the Mill River and then crossing the tracks.

On Exhibit 2 to the Complaint, ROW1 is depicted by a yellow arrow and ROW2 is depicted with a red arrow.

On or before May 6, 2021, GU, without notice to or permission from Hopedale Properties, unilaterally and intentionally obstructed two of Hopedale Properties' at-grade private crossing easements, entirely blocking Hopedale Properties' access from and through Hopedale Properties' adjoining properties. GU then commenced construction of new railroad tracks across the easements, altering the grade of the crossings by raising the railroad bed and obstructing the crossings. Despite repeated requests and now the Complaint from Hopedale Properties, GU has refused to restore the crossings in violation of Hopedale Properties' easement rights.

ARGUMENT

1. GU Has No Right to Interfere with Hopedale Properties' Discretion and Right to Establish and Maintain Crossings over the ROW

When Hopedale Properties' predecessor, Draper Company, conveyed GU's right-of-way to the railroad in 1904, Draper Company reserved to itself the following broad rights to cross GU's right-of-way at any location, subject to the railroad's right to operate, along with a reversionary interest should railroad use of the right-of-way be abandoned:

> Grantor expressly reserves to itself, **its successors and assigns, forever the full and perfect right** for its officers, employees and agents and for all other persons authorized or permitted by it, **to cross at all times over the said premises, at such places and in such manner as may by it be deemed necessary, desirable or proper, and especially fully reserving whatever rights of passage now exist or are in habitual use over said premises for any purpose whatsoever**, the exercise of all said rights, however, always to be consistent with the full perfect use of said premises for all railroad purposes.

See Complaint, Exhibit 1, deed from Draper Company to Grafton & Upton Railroad Company, February 23, 1904, recorded at Book 1774, page 362 in the land records of Worcester County, Massachusetts (emphasis added). The easement language quoted above appears on page 363 of the deed; the reverter is described at page 364. As successor in interest to the Draper Company, Hopedale Properties, not GU, possesses the sole right and discretion to determine the location and configuration of any crossings of GU's right-of-way as long as such crossing does

not materially impair the railroad's ability to conduct its operations. Accordingly, GU's unilateral actions to reconfigure its track and impair Hopedale Properties' at-grade crossings violated Hopedale Properties' easement rights, and the relief to which Hopedale Properties is entitled is within the jurisdiction of the state courts, not this Board.

2. GU Has No Right to Occupy, Use, or Alter Hopedale Properties' Premises Adjacent to GU's Right-of-Way

This Board has long established that a railroad's exercise of its common carrier rights on its right-of-way does not entitle the railroad to occupy, use, or alter the property of others without leave to do so, or to recklessly damage such property. A railroad's activity does not constitute "transportation" under the ICC Termination Act of 1995 ("ICCTA") simply because a railroad happens to be the party undertaking the activity. Rather, as the Eleventh Circuit explained –

> [P]re-emption applies only to state laws "with respect to *regulation* of rail transportation." 49 U.S.C. § 10501(b) (emphasis added). This necessarily means something qualitatively different from laws "with respect to rail transportation." *See Bennett v. Spear*, 520 U.S. 154, 173 (1997) (relying on "'cardinal principle of statutory construction' [that courts must] 'give effect, if possible, to every clause and word of a statute.'") (citations omitted). In this manner, Congress narrowly tailored the ICCTA pre-emption provision to displace only "regulation," i.e., those state laws that may reasonably be said to have the effect of "managing" or "governing" rail transportation, Black's Law Dictionary 1286 (6th ed. 1990), while permitting the continued application of laws having a more remote or incidental *effect* on rail transportation.

Fla. E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324, 1331 (11th Cir. 2001) (second emphasis added); *accord Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 157 (4th Cir. 2010). In the same vein, "not all activities connected with rail transportation are considered 'transportation' under the statute." *Del Grosso v. Surface Transp. Bd.*, 811 F.3d 83, 118 (1st Cir. 2016) (Order on Petition for Panel Rehearing) (emphasis added); *see also Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1129 (10th Cir. 2007) ("While certainly expansive, [the] definition of 'transportation'

does not encompass everything touching on railroads," but "focuses on physical instrumentalities 'related to the movement of passengers or property' " and on " 'services related to that movement' "). Instead, "transportation" is limited to a "property, facility, instrumentality, or equipment of any kind *related to the movement of passengers or property*, or both, by rail . . . ." 49 U.S.C. § 10102(9)(A) (emphasis added). Because this definition marks the boundaries of the ICCTA's express preemption of state and local law, it must be "narrowly and strictly construed." *Montalvo v. Spirit Airlines*, 508 F.3d 464, 474 (9th Cir. 2007) (citing *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998)); *see also Franks Investment Co. v. Union Pacific R.R.*, 593 F.3d 404, 407 (5th Cir. 2011) ("[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption.") (quoting *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008)). Accordingly, only state laws which directly and indiscriminately target essential aspects of railroad operations are preempted under this standard.[2]

Damaging the property of others in the course of conducting activities to improve facilities used in "transportation" is not "transportation". Indeed, the Tenth Circuit has found that an expansive interpretation of the ICCTA that would bring any action by a railroad under the rubric of "transportation" would lead to patently absurd results: for instance, permitting a railroad to "dispose of a dilapidated engine in the middle of Main Street" merely because it involved the disposition of railroad equipment related to the movement of passengers or property would not

[2] In an environmental enforcement action prosecuted by the Massachusetts Department of Environmental Protection ("DEP") in 2000, GU failed in its bid to assert federal preemption under ICCTA to prevent the application of the Massachusetts Wetlands Protection Act (the "Act"). GU, on a parcel adjacent to the Properties, filled in a drainage trench that was in a protected wetland resource area as defined by the Act, interfering with Hopedale Properties' vested water rights and disrupting natural drainage flows. *See* Complaint Exhibits 15-17.

constitute "transportation". *See Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1132 (10th Cir. 2007).

GU's reliance on *The City of Ozark, Arkansas – Petition for Declaratory Order*, STB Docket No. FD 36104 (Service Date July 28, 2017), is misplaced. In that case, a municipality sought to compel a railroad to re-establish an at-grade highway-rail crossing that had been removed some 15 years previously, and the Board found, on the basis of the specific circumstances relevant to the configuration and safety of the track, roadway, and former crossing, and the railroad's demonstration that re-establishing the crossing would unreasonably impair its ability to fulfill its common carrier obligation, that the municipality's action was preempted (*City of Ozark*, slip op. at 5-6). Here, GU makes vague references, without citing any authority, to "federal safety regulations" (GU Petition at 5), and alleges the necessity for changes to its right of way that are nevertheless entirely driven by actions GU undertook wholly at its own discretion such as running longer trains and installing a switch (*Id.*).

Under facts far more relevant to Hopedale Properties' situation than the circumstances described in *City of Ozark*, the United States Court of Appeals for the Fifth Circuit found that a possessory action brought by a property owner seeking to enjoin a railroad from removing private crossings was neither categorically preempted nor preempted as applied by ICCTA. There, the Court determined that a crossing dispute involving precisely the kind of easement interest Hopedale Properties possesses over GU's right-of-way was wholly a matter of state law. *Franks Investment Co.*, 593 F.3d at 411.

Particularly where no state or municipal preclearance action is involved and the railroad has damaged the private property of another, state law is not preempted and the damaged property owners may obtain relief for the harm the railroad caused. *Buddy and Holley Hatcher –*

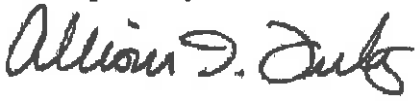
Petition for Declaratory Order, STB Docket No. FD 35581, slip op. at 7-8 (Service Date Sept. 21, 2012), 2012 WL 4320648 (finding no ICCTA preemption of the application of state law to provide relief to property owners whose real property adjacent to a railroad right-of-way was damaged in the course of railroad salvage and regrading activities); *Emerson*, 503 F.3d at 1134 (holding an adjacent property owner could seek relief for damages and injunctive relief in state court for a railroad's failure to clear vegetation and debris from a drainage ditch which caused flooding that damaged the adjacent property). Indeed, as in *Emerson*, acts damaging the property of others "are not instrumentalities 'of any kind related to the movement of passengers or property' or 'services related to that movement.' Rather, they are possibly tortious acts committed by a landowner who happens to be a railroad company." *Emerson*, 503 F.3d at 1130 (internal citation omitted).

CONCLUSION

GU cannot demonstrate that it has suffered any harm that this Board can address, and any actions GU has unilaterally undertaken, to the detriment of Hopedale Properties, are post-hoc attempts to rectify self-created operational hardships. The Board should accordingly reject the GU Petition.

WHEREFORE, and in view of the foregoing, Hopedale Properties, LLC, respectfully requests this Board to expeditiously deny the GU Petition.

Respectfully submitted,



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Counsel for Hopedale Properties, LLC

Dated: July 16, 2021

Exhibit A

Complaint

First American Realty, Inc., Hopedale Properties, LLC, and Hopedale Industrial Center, LLC
v.
Grafton & Upton Railroad Company, First Colony Development and rail Holding Company, and Jon Delli Priscoli

Commonwealth of Massachusetts
Superior Court Department of the Trial Court, Worcester County
Civil Action No. 2185CV00784

[Attached hereto]

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

FIRST AMERICAN REALTY, INC., HOPEDALE PROPERTIES, LLC, and HOPEDALE INDUSTRIAL CENTER, LLC, Plaintiffs, v. GRAFTON & UPTON RAILROAD COMPANY, FIRST COLONY DEVELOPMENT AND RAIL HOLDING COMPANY, and JON DELLI PRISCOLI, Defendants.	Civil Action No.

VERIFIED COMPLAINT

Plaintiff property owners bring this declaratory judgment action to confirm two deeded, century-old and continually existing easements across railroad tracks owned and controlled by defendant Grafton & Upton Railroad Company and Jon Delli Priscoli ("Railroad Defendants"). The right of way at-grade easements are the only direct connections between properties assembled and owned by Plaintiffs on either side of the tracks. This action also seeks injunctive relief to order the Railroad Defendants to restore Plaintiffs' unobstructed access and right to use those easements. On or before May 6, 2021, the Railroad Defendants, without notice to or permission from Plaintiffs, unilaterally, knowingly and intentionally obstructed two of Plaintiffs' easements, entirely blocking Plaintiffs' access from and through Plaintiffs' adjoining properties. The Railroad Defendants then commenced construction of new above-grade railroad tracks across the easements. The Railroad Defendants have affirmatively refused to restore Plaintiffs'

access following Plaintiffs' demand that the two crossings be restored to prior existing at-grade level.

This despite the Railroad Defendants' acknowledgement of Plaintiffs' easement rights and restoration of access in prior years. In 2013, the Railroad Defendants similarly obstructed Plaintiffs' rights of way across the tracks during another track reconstruction. At that time, upon Plaintiffs' request and demand, the Railroad Defendants restored the at-grade crossings, recognizing and acknowledging Plaintiffs' property rights. Now, however, the Railroad Defendants foster an ongoing personal grudge against Plaintiffs, and flatly refuse to restore Plaintiffs' access and continue to obstruct and interfere with Plaintiffs' property rights, without justification. Because the Railroad Defendants as well as defendant First Colony Development and Rail Holding Company (together, "Defendants") refuse to honor Plaintiffs' easements and continue to block Plaintiffs' right to access and use Plaintiffs' properties, relief is necessary and appropriate from this Court. In addition to declaratory and injunctive relief, Plaintiffs also seek damages from Defendants caused by their unlawful intrusions on Plaintiffs' property rights and for Defendants' interference with Plaintiffs' easements.

PARTIES

1. Plaintiff First American Realty, Inc. is a Massachusetts corporation organized and existing under the laws of Massachusetts and with its principal place of business located in Worcester, Massachusetts.

2. Plaintiff Hopedale Properties, LLC is a limited liability company organized and existing under the laws of Delaware and registered in Massachusetts and with its principal place of business located in Worcester, Massachusetts.

3. Plaintiff Hopedale Industrial Center, LLC is a limited liability company organized and existing under the laws of Massachusetts and with its principal place of business located in Worcester, Massachusetts.

4. Defendant Grafton & Upton Railroad Company ("G&U") is a domestic profit corporation organized and existing under the laws of Massachusetts and with its principal place of business located in North Grafton, Massachusetts

5. Defendant Jon Delli Priscoli is the principal owner of Grafton & Upton Railroad Company and resides in North Grafton, Massachusetts.

6. Defendant First Colony Development and Rail Holding Company ("First Colony") is a domestic profit corporation organized and existing under the laws of Massachusetts and with its principal place of business located in Carver, Massachusetts. First Colony is the present owner of the 1 Fitzgerald Drive property.

JURISDICTION AND VENUE

7. The Massachusetts Superior Court Department has subject matter jurisdiction pursuant to M.G.L. c. 212, §§ 3 and 4 and because the harm alleged by Plaintiffs in an amount to be proven at trial is estimated to exceed the minimum jurisdictional amount of that Court.

8. The Massachusetts Superior Court Department has personal jurisdiction over Defendants pursuant to M.G.L. c. 223A because each Defendant transacted business in Massachusetts, contracted to supply services or things in Massachusetts, caused tortious injury by an act or omission in Massachusetts, and/or resides in Massachusetts.

9. Venue in Worcester County Superior Court Department is proper pursuant to M.G.L. c. 223 § 1 because each corporate entity Defendants' principal place of business is in

Worcester County, Massachusetts and all Defendants conduct business in Worcester County, Massachusetts.

FACTUAL BACKGROUND

Plaintiffs' Easements and Rights of Way

10. Plaintiffs currently own and manage, through management company First American Realty, Inc. ("First American"), approximately 77 acres of the former Draper Complex, formerly, approximately 1,800,000 square feet of buildings and land adjoining it, and in close proximity, made up of 163 Freedom Street, 24 Hopedale Street, 85 Freedom Street, 105 Freedom Street, 21 Lake Street, 80 Bancroft Park, 23 Hopedale Street, 52 Prospect Street, 49 Prospect Street, 7 Fitzgerald Drive, 9 Fitzgerald Drive, 6 Fitzgerald Drive, 4 Fitzgerald Drive, 32 Cemetery Street, 12 Rear Bancroft, 9 Depot Street and easements and water rights to the Mill River (collectively, the "Plaintiffs' Properties" or "Properties"). See Certificate of Title Report, attached hereto as **Exhibit 1**; see also annotated aerial images and maps, attached hereto as **Exhibit 2**. On Exhibit 2, ROW1 is depicted by a yellow arrow; ROW2 is depicted with a red arrow.

11. The former Draper Complex in Hopedale, Massachusetts was once the home of the Draper Corporation, the largest manufacturer of power looms in the United States. It was in operation for over 130 years and was finally shuttered when the last worker left in or about 1980.

12. Plaintiffs have assembled the Properties over a period commencing in 1990. They have invested millions of dollars in acquisition; remediation of the property of environmental hazards and contaminants; and demolition of the majority of former site buildings and pre-development improvements of the site, all in preparation for redevelopment.

13. Plaintiffs are actively in cooperation with the Town of Hopedale and the Worcester Business Development Corporation ("WBDC") to complete demolition of the century-old factory buildings at the Properties and redevelop the assembled Properties and downtown Hopedale. See Hopedale Properties and Town joint press release, attached hereto as **Exhibit 3**.

14. G&U Railroad tracks bisect Plaintiffs' Properties, including, separating 6 Fitzgerald Drive; 32 Cemetery Street; 4 Fitzgerald Drive; 80 Bancroft Park; and 12 Rear Bancroft Park to the southwest from the rest of Plaintiffs' assemblage.

15. Defendants operate a facility at 1 Fitzgerald Drive, the former West Foundry Building, wedged between and among Plaintiffs' Properties. See Ex. 2.

16. Plaintiffs' Properties, 1 Fitzgerald Drive, the Grafton and Upton Railroad and a portion of the railroad tracks themselves, were all formerly owned by the Draper Corporation.

17. In the late 1800s and early 1900s, the Draper Corporation conveyed parcels to G&U Railroad for purposes of rail line development and operation.

18. As set forth more fully below, the Draper Corporation, its assigns and successors, retained deeded rights of way, crossings and easements across the railroad as part of the conveyances to the G&U Railroad.

19. Those deeded rights of way and easements continue today through Plaintiffs' title to the beneficial, dominant Properties. These rights of way and easements cross over the G&U Railroad's rail line.

20. The key parcels of Plaintiffs' Properties and assemblage are 24 Hopedale Street and 85 Freedom Street, the site of the primary former buildings of the former Draper Complex. The only direct way to access 24 Hopedale Street and 85 Freedom Street from 6 Fitzgerald Drive

and other Plaintiff Properties southwest of the railroad is by use of the private at-grade railroad crossing immediately to the northwest of the Mill River. See Ex. 2. This Right of Way ("ROW1") is also the only direct southern means of egress for the large 24 Hopedale Street parcel.

21. Plaintiffs and their predecessors in title have regularly and continually used ROW1, including as part of the site demolition and redevelopment project, to transport materials to and from the site for years.

22. ROW1 is critical to the redevelopment, operation and future use of the assembled Properties. ROW1 provides access to the Properties from Route 16, a state highway, via Fitzgerald Drive, a private road owned by Plaintiffs. Until Defendants expanded a driveway at Route 16 as their access, their primary access was also Fitzgerald Drive.

23. Plaintiffs and/or their predecessors in title have regularly and continually controlled and managed access and use of ROW1, including through the use of a chained gate on the northern side of the crossing and a guard post on the southern side of the crossing.

24. The only way to access 7 and 9 Fitzgerald Drive from 6 Fitzgerald Drive is by the private at-grade railroad crossing immediately to the east of the Mill River, Right of Way 2 ("ROW2"). See Ex. 2. This ROW2 is accessed by crossing a bridge over the Mill River and then across the tracks.

25. Plaintiffs have historically further utilized ROW2 through its lease arrangement with a trailer company and other tenants. See lease and photos, attached hereto as **Exhibit 4**.

26. Plaintiffs have regularly and continually controlled and managed access and use of ROW2.

27. Until Gerrity Company leased 1 Fitzgerald Drive to Defendant Delli Priscoli, ROW2 was also the primary access to 1 Fitzgerald Drive.

28. ROW2 has also historically been used, with Plaintiffs' permission and coordination with the Town's Highway Department, by the public to access the Town's recycling center, as well as the parking of Town School Buses, which Hopedale Properties, LLC permitted on its property at 9 and 6 Fitzgerald Drive.

29. ROW2 is critical to the redevelopment, operation and future use of the assembled Properties and also access to Depot Street, a public way.

30. ROW1 and ROW2 have been continually used and controlled by Plaintiffs. See, e.g., Ex. 2 and historical aerial photographs clearly depicting the two crossings, attached hereto as **Exhibit 5**.

31. By deed dated February 23, 1904, Draper Corporation conveyed to G&U Railroad a narrow strip of property for railroad use and reconstruction. See Ex. 1.

32. In the 1904 Deed, Draper Corporation, the grantor:

> [E]xpressly reserves to itself, **its successors and assigns, forever the full and perfect right** for its officers, employees and agents and for all other persons authorized or permitted by it, **to cross at all times over the said premises, at such places and in such manner as may by it be deemed necessary, desirable or proper, and especially fully reserving whatever rights of passage now exist or are in habitual use over said premises for any purpose whatsoever**, the exercise of all said rights, however, always to be consistent with the full perfect use of said premises for all railroad purposes.

Ex. 1. (emphasis added).

33. There is no ambiguity in the language of the deed, its effect on the rights of passage in existence, or the continuation of those uses and rights for the benefit of Plaintiff property owners.

34. The deeded rights of passage include ROW1 and ROW2, as historical traveled ways, each of which is documented in historical documents, plans and maps. ROW1 and ROW2 have been in existence and use for well over a century and are indicated in maps and plans dating back to at least 1917, depicted as "Traveled Ways" on G&U Railroad's Valuation Map. See Ex. 1, at Plan 1; and Worcester County Commissioner plan, Ex. 1, at Plan 2.

35. ROW1 has since been used and controlled by Draper, and its successors, including Plaintiffs.

36. ROW1 is shown clearly in other maps and plans over time, including on the 1980 Hopedale Realty Trust plans, recorded with the Worcester County Registry of Deeds. See June 4, 1980 and July 16, 1980 Hopedale Realty Trust Plans and Guerriere & Halnon March 14, 1980 Plan, attached hereto as **Exhibit 6**. These plans show that ROW1 as it existed prior to Defendants' obstruction is consistent with the century-old traveled way and its continued use to the present day.

37. ROW2 has since been used and controlled by Draper, and its successors, including Plaintiffs.

38. ROW2 is shown clearly in other maps and plans over time, including on the 1975 Plan by Hayward-Boynton & Williams, Inc. ("Hayward-Boynton Plan"). See Hayward-Boynton 1975 Plan (Depicted as an extension of Right of Way B), attached hereto as **Exhibit 7**.

39. Plaintiffs have used and maintained each of these rights of way (ROW1 and ROW2) continually, including as part of the redevelopment project that is currently being undertaken with the cooperation of the Town of Hopedale and assistance of WBDC.

40. The rights of way (ROW1 and ROW2) are vital and necessary to the development and marketability of Plaintiffs' Properties.

Defendants' Improper and Illegal Obstruction of Plaintiffs' Easements and Rights of Way

41. In early 2021, the Railroad Defendants, without prior notice or permission abruptly and intentionally blocked ROW1 and ROW2 by digging up and removing asphalt between the tracks and installing new railroad tracks, well above grade and impassable, blocking any and all vehicular traffic as well as placing a large cement block in the way of Plaintiffs' access to its ROW1. See photos attached hereto as **Exhibit 8**.

42. Despite demand by Plaintiffs, the Railroad Defendants failed and refused to repave the crossings up to and between the railroad tracks at ROW1 and ROW2, and otherwise failed and refused to restore access across ROW1 and ROW2.

43. The Railroad Defendants obstructed and prevented Plaintiffs' access to their Properties in violation of Plaintiffs' deeded easements and Plaintiffs' historical, continual and necessary use of ROW1 and ROW2.

44. By letter from counsel, Plaintiffs demanded that the Railroad Defendants immediately restore Plaintiffs' access and cease interference with Plaintiffs' property rights at ROW1 and ROW2. See May 6, 2021 Letter, attached hereto as **Exhibit 9**.

45. The Railroad Defendants' counsel responded on May 13, 2021 that "I do not expect that G&U will restore unobstructed access across its rail tracks." See Keavany email, attached hereto as **Exhibit 10**.

46. The Railroad Defendants have refused to restore ROW1 and ROW2.

47. The Railroad Defendants continue to obstruct passage over and access to ROW1 and ROW2.

48. Defendant Grafton & Upton Railroad Company also filed a petition with the federal Surface Transportation Board, wrongfully invoking federal railroad preemption, a claim

without merit, forcing Plaintiffs to respond to the claim. The petition with the STB remains pending.

49. The Railroad Defendants continue to refuse to restore Plaintiffs' crossings at ROW1 and ROW2.

50. The Railroad Defendants have failed, despite several demands and requests from Plaintiffs, to provide any deed that shows the Railroad Defendants have a right to obstruct ROW1 or ROW2.

51. The Railroad Defendants are well aware of Plaintiffs' easement rights at ROW1 and ROW2.

52. The Railroad Defendants previously acknowledged Plaintiffs' property rights to the at-grade crossings of the railroad tracks.

53. In 2013, the Railroad Defendants similarly undertook rail line reconstruction and similarly obstructed Plaintiffs' access at ROW2.

54. At that time, Plaintiffs demanded that the Railroad Defendants restore access. See Plaintiffs' email dated October 29, 2013, attached hereto as **Exhibit 11**. Philip Shwachman, President of First American, informed Defendant Delli Priscoli "[y]our work at the grade crossing and equipment has been and is still blocking my access to my property at 7 Fitzgerald Drive. Please restore our access over the tracks and to our property immediately."

55. The Railroad Defendants acknowledged and admitted that Plaintiffs hold easement rights to the two at-grade crossings at ROW1 and ROW2. Defendant Delli Priscoli, by email dated October 29, 2013, stated that "these private crossings are typically at the cost of the property owner they benefit but I am doing both as gesture to you so any help as far as access to accomplish this benefit is appreciated sorry for any misunderstanding - both of these crossings

are to complete by weeks end and cleaned up". See, Ex. 11, Delli Priscoli October 29, 2013 email response.

56. The Railroad Defendants, in 2013, did restore Plaintiffs' unobstructed access. See Ex. 2.

57. Nothing has occurred since 2013 to change, alter or lessen Plaintiffs' easement rights to cross at ROW1 and ROW2.

58. The Railroad Defendants, motivated by unchecked personal animus towards Plaintiffs, and along with First Colony as direct competitors in acquisition of property ownership in downtown Hopedale, seek to intentionally cause harm and damage to Plaintiffs.

59. For years, Defendants and Plaintiffs have sought the same or similar properties in Hopedale and have been parties on opposite sides of land deals.

60. Defendants and Plaintiffs are business competitors, as abutting property owners and developers in downtown Hopedale.

61. The Town of Hopedale has initiated a study to evaluate the impacts of both Plaintiffs' redevelopment project and Defendants' development plan on downtown Hopedale. See Town of Hopedale Community One Stop Application, attached hereto as **Exhibit 12**.

62. Defendants have submitted an application for a grant from the Commonwealth of Massachusetts under the Industrial Rail Access Program ("IRAP"). See IRAP application, attached hereto as **Exhibit 13**.

63. Defendants' IRAP application seeks funding as part of their development and construction at 1 Fitzgerald Drive, including the railroad track construction that now blocks Plaintiffs' ROW1 and ROW2.

64. In Defendants' IRAP application, Defendants intentionally misstated and certified that Defendants' right-of-way is complete and that there are no right of way considerations to address or resolve.

65. This was a materially false misstatement made to obtain funding for the project that is in competition and contradiction with Plaintiffs' abutting Properties and redevelopment plans.

66. If Defendants' IRAP application is approved and funded, the grant and the IRAP project, to the extent used to interfere with Plaintiffs' easements and rights of way, will damage Plaintiffs' redevelopment project.

67. Defendants have caused economic harm by their illegal obstruction of Plaintiffs' access.

68. Defendants' property incursions, trespass and encroachment at ROW1 and ROW2 are part of an ongoing course of conduct of wrongful and illegal acts designed to take increasing portions of Plaintiffs' property rights.

Other Improper and Illegal Incursions on Plaintiffs' Property Rights By Defendants

69. In 2014, Plaintiffs and Defendants engaged in a land swap deal in which Defendants signed an Easement Agreement which referenced and incorporated the Hayward-Boynton Plan. See Agreements and Plan, attached hereto as **Exhibit 14**.

70. In the Easement Agreement, Plaintiffs granted to Defendants easements to travel in common with others along Fitzgerald Drive, Right of Way A and Right of Way B, as shown on the Hayward-Boynton Plan.

71. Right of Way A runs along Fitzgerald Drive from Route 16, along the Mill River into Right of Way B. Right of Way B continues along Fitzgerald Drive and the Mill River and turns right over the Mill River bridge onto 1 Fitzgerald Drive, adjacent to the railroad track.

72. The Hayward-Boynton Plan, which Defendants endorsed, also includes ROW2, which branches off of Right of Way B to cross the railroad tracks.

73. As indicated on the Hayward-Boynton Plan, the width of Right of Way B extends in an arc along the area southwestern edge of the railroad track after crossing the bridge.

74. At the time the Easement Agreement referencing the Hayward-Boynton Plan was executed, a fence established the perimeter of Right of Way B and formerly a gate separated Right of Way B from the track crossing at ROW2.

75. Overtime, Defendants, with no permission or notice, removed the chain link fence that demarked the perimeter of Right of Way B.

76. Defendants have restricted and continue to restrict Plaintiffs from the full benefit of their Right of Way B by encroaching onto over half of its width at one point and blocking Plaintiffs' full unrestricted use.

77. Defendants have further improperly damaged other sections of Plaintiffs' fence.

78. In another illegal act by Defendants, designed to stake claim to more property, in or about 2008, Defendants filled or caused to be filled a drainage trench, a protected wetland resource area under the Massachusetts Wetlands Protection Act. The wetland previously flowed across and through 1 Fitzgerald Drive into the Mill River.

79. Plaintiffs own the water rights to the Mill River. See Deed attached hereto as **Exhibit 15**.

80. When challenged, Defendants, as is their habit, sought to use federal railroad preemption as a sword rather than a shield, arguing to the Massachusetts Department of Environmental Protection ("DEP") that "the Department's enforcement of the Massachusetts Wetlands Protection Act . . . and the Wetlands Regulations . . . with respect to the Hopedale Railyard is preempted by 49 U.S.C. § 10501." See Petitioner's Motion for Summary Judgment, attached hereto as **Exhibit 16**.

81. The DEP, however, disagreed when it issued a Superseding Determination of Applicability ("SDA"). The DEP Office of Appeals affirmed the SDA and because Defendants "altered significantly" the Bank to an Intermittent Stream and the Mill River and other wetland resource areas protected under the state Wetlands Protection Act that the DEP's issuance of the SDA was a regulatory action not subject to federal railroad preemption. See DEP Recommended and Final Decision, attached hereto as **Exhibit 17**.

82. For further context, Plaintiffs' Properties are subject to pending litigation between Plaintiffs and Defendants concerning Defendants' attempts to acquire portions of Plaintiffs' Properties through an unlawful Urban Renewal Plan. See Shwachman, et al. v. Town of Hopedale, et al., Worcester Superior Court C.A. No. 1885-cv-1781. Plaintiffs brought claims against Defendants and various municipal boards, commissions and private individuals in the Town of Hopedale challenging the conspiratorial actions of the Town as orchestrated by Defendants. Plaintiffs brought their claims against the Defendants in the prior litigation because the Defendants tried to steal Plaintiffs' Properties through an unlawful taking for railroad use. Plaintiffs have settled the action against all municipal defendants but not some of the named Defendants herein.

83. Defendants had sought to be the developers of Plaintiffs' Properties under the tainted Urban Renewal Plan.

84. Defendants are now, again, unlawfully attempting to seize and control Plaintiffs' property and interfere with Plaintiffs' property rights.

85. Beginning on or about June 10, 2021, Defendants used a new tactic to try to squeeze Plaintiffs and claim more of Plaintiffs' land by sending a demand letter dated June 10, 2021 and an email dated June 28, 2021, through counsel, alleging that Plaintiffs' chain link fence, which has been in existence for at least 70 years, encroaches upon Defendants' property. The communications attached a purported "Encroachment Plan" and a railroad Val Map. See attached communications at **Exhibit 18**.

86. Plaintiffs' counsel repeatedly requested deeds or other documents that established Defendants' ownership to so much of the Properties that Defendants' alleged were encroaching. No deeds or legal description with metes and bounds were provided.

87. Regardless, the "Revised Encroachment Plan", which is not supported or verified by any written deed, purports to show that the historic chain link fence encroaches in three sections: (1) 175-foot section by 5 inches or less; (2) 260-foot section by 16 to 26 inches; and (3) a 625-foot section by 18 inches to a little over 12 feet at a small section.

88. The Val Map does not establish Defendants' rights to the small areas of land at issue. The Val Map does, however, include both ROW1 and ROW2 as "Traveled Ways" and preclude Defendants from denying the existence and use of ROW1 and ROW2.

89. Plaintiffs deny that the fence encroaches.

90. Defendants' motivation for raising the fence issue now is clearly designed to harass Plaintiffs.

91. Defendants regularly act with intentional and blatant violation of state and local laws.

92. Defendants believe that they are entitled to violate state and local law with no consequence because they operate a railroad line and cry federal railroad preemption whenever challenged.

93. Defendants are not entitled to violate Plaintiffs' property rights, obstruct Plaintiffs' easements and encroach upon Plaintiffs' Properties.

94. Defendants are not entitled to federal railroad preemption on these matters.

COUNT I
Declaratory Judgment and Injunctive Relief – declaration that Plaintiffs hold recorded title to two deeded easements (ROW1 and ROW2) or, in the alternative, implied easements (ROW1 and ROW2); order that the Railroad Defendants to restore Plaintiffs' unobstructed access at ROW1 and ROW2

95. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

96. An actual controversy exists between Plaintiffs and the Railroad Defendants with respect to whether Plaintiffs hold title to easements across Defendants' railroad tracks at ROW1 and ROW2.

97. An actual controversy also exists between Plaintiffs and the Railroad Defendants with respect to whether the Railroad Defendants are permitted to obstruct access and passage over ROW1 and ROW2.

98. These controversies threaten to cause, have caused, and will continue to cause damage to Plaintiffs.

99. These controversies are ripe for adjudication.

100. Plaintiffs have not made prior application for the relief sought herein to this Court or any other court.

101. Plaintiffs hold title to easements at ROW1 and ROW2.

102. In the alternative, Plaintiffs hold implied easements at ROW1 and ROW2.

103. Plaintiffs are entitled to unobstructed access and use of ROW1 and ROW2.

104. The Railroad Defendants have unlawfully blocked and obstructed ROW1 and ROW2.

105. The Railroad Defendants refuse to restore Plaintiffs' access to and over ROW1 and ROW2.

106. There is no other available remedy to protect Plaintiffs' rights or to compel appropriate action.

107. This Court should order the Railroad Defendants to immediately restore unobstructed at-grade access to Plaintiffs at ROW1 and ROW2.

COUNT II

Declaratory Judgment and Injunctive Relief – declaration that Defendants have encroached upon easement rights held by Plaintiffs (Right of Way B); order Defendants to restore Plaintiffs' easement (Right of Way B) in full

108. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

109. An actual controversy exists between Plaintiffs and Defendants with respect to other property incursions over and upon Plaintiffs' easement rights.

110. Defendants have deprived and are depriving Plaintiffs of approximately half of the width at a portion of Plaintiffs' Right of Way B as depicted on the Hayward-Boynton Plan. Ex. 7.

111. Plaintiffs' have a right to an easement at Right of Way B.

112. The Hayward-Boynton Plan showing the location of Right of Way B was referenced and included as part of an agreement between Plaintiffs and Defendants and signed by Defendant Delli Priscoli. See Ex. 16.

113. Defendants wrongfully and improperly removed Plaintiffs' fencing at and near ROW2 and at other locations.

114. Defendants have been and are currently encroaching on a portion of Right of Way B, depriving Plaintiffs from use of half of the width at that portion of the easement. These controversies threaten to cause, have caused, and will continue to cause damage to Plaintiffs.

115. These controversies are ripe for adjudication.

116. Plaintiffs have not made prior application for the relief sought herein to this Court or any other court.

COUNT III
Interference with Easements (ROW1, ROW2, Right of Way B)

117. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

118. Plaintiffs have a right to unobstructed easements at ROW1 and ROW2.

119. Plaintiffs have a right to an unobstructed easement at Right of Way B.

120. Plaintiffs have a right to property with a property line bordered by the previously existing fence.

121. Plaintiffs have a right to access and travel over the easements at ROW1, ROW2 and Right of Way B.

122. Defendants have wrongfully and illegally interfered with each of Plaintiffs' easement rights as set forth above.

123. As a direct and proximate result of Defendants' acts, Plaintiffs have been prevented from the enjoyment of their fundamental property rights and have suffered damages due to, among other things, loss of access to other portions of Plaintiffs' assemblage.

124. Defendants are jointly and severally liable in damages to Plaintiffs.

125. Plaintiffs have suffered injuries as a result of Defendants' wrongful acts and omissions for which Defendants are liable in an amount to be determined at trial.

COUNT IV
Trespass

126. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

127. Plaintiffs have easement rights to unobstructed access to and over ROW1, ROW2 and Right of Way B.

128. Defendants have trespassed and encroached onto Plaintiffs' easements through the removal of asphalt roadways and the installation of obstructing railroad tracks far enough above grade at ROW1 and ROW2 to obstruct Plaintiffs' use of its crossings.

129. Defendants have trespassed and continue to trespass onto Plaintiffs' easements at Right of Way B.

130. As a direct and proximate result of Defendants' trespasses, Plaintiffs have been prevented from the enjoyment of their fundamental property rights and have suffered damages.

131. Defendants are each jointly and severally liable in damages to Plaintiffs.

132. Plaintiffs have suffered injuries as a result of Defendants' wrongful acts and omissions for which Defendants are liable in an amount to be determined at trial.

COUNT V
M.G.L. c. 93A

133. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

134. Defendants and Plaintiffs are engaged in trade and commerce in downtown Hopedale.

135. Defendants and Plaintiffs are business competitors, as abutting property owners and developers in downtown Hopedale.

136. Defendants have committed unfair and deceptive acts, including by making deceptive and materially misleading statements in Defendants' IRAP application, and unfairly obstructed access to Plaintiffs' Properties without advance notice.

137. The acts were knowing and willful and were committed to induce funding from Massachusetts to the detriment of Plaintiffs, and to interfere with Plaintiffs' development project.

138. As a direct and proximate result of Defendants' acts, Plaintiffs have suffered loss of money and property and will continue to suffer further damages in an amount to be determined at trial.

139. Because Defendants' acts were willful, Plaintiffs are entitled to treble damages.

COUNT VI
Intentional Interference with advantageous business relationships

140. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

141. Plaintiffs have an advantageous business relationship with the Town of Hopedale to demolish the remaining buildings on the Properties and to redevelop the Properties for future use.

142. Plaintiffs further have advantageous business relationships with Worcester Business Development Corporation as well as future users and tenants of the redevelopment project.

143. Defendants have intentionally interfered with those business relationships by obstructing easement rights and engaging in other unauthorized practices, as described above.

144. Defendants' actions were intentional and designed to lessen the usefulness and value of Plaintiffs' Properties to Defendants' benefit in development.

145. As a direct and proximate result of Defendants' acts, Plaintiffs have suffered loss of money and property and will continue to suffer further damages in an amount to be determined at trial.

COUNT VII
Declaratory Judgment – Plaintiffs' fences do not intrude or encroach on Defendants' property

146. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

147. An actual controversy exists between Plaintiffs and Defendants with respect to whether Plaintiffs' fences encroach upon Defendants' property.

148. Plaintiffs' fences have been in existence for at least 70 years.

149. Plaintiffs dispute that the Plan sent by Defendants is accurate.

150. Defendants have not submitted any deeds with metes and bounds that support their assertion that the fence line encroaches.

151. According to the Plan sent by Defendants, to the extent the fence crosses the property line, it is by mere inches in most locations. To the extent Defendants claim that the fence encroaches by up to 12 feet, Plaintiffs deny Defendants' assertions as to the location of the property line vis-à-vis the fence and call upon them to prove same.

152. These controversies threaten to cause, have caused, and will continue to cause damage to Plaintiffs.

153. These controversies are ripe for adjudication.

154. Plaintiffs have not made prior application for the relief sought herein to this Court or any other court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court award the following relief:

1. Enter a judgment on each and every Count of the Verified Complaint in their favor and award them damages in such amount as may be proved at trial and so assessed by the jury against each Defendant, jointly and severally;

2. Enter a declaratory judgment determining the rights of the parties and declaring that Plaintiffs hold title to unobstructed easements at ROW1 and ROW2, or in the alternative, that Plaintiffs hold implied easements at ROW1 and ROW2;

3. Enter a declaratory judgment determining the rights of the parties and declaring that Plaintiffs hold title to an unobstructed easement at Right of Way B;

4. Enter an order that Defendants have interfered with Plaintiffs' easements at ROW1, ROW2 and Right of Way B;

5. Enter an order that Defendants have committed trespass on Plaintiffs' easements at ROW1, ROW2 and Right of Way B;

6. Enter an order that Defendants have intentionally interfered with Plaintiffs' advantageous business relationships;

7. Enter an order that Defendants immediately restore unobstructed at-grade crossing access to and over ROW1 and ROW2;

8. Enter an order that Defendants immediately restore unobstructed full access to and use of Right of Way B;

9. Enter an order that Defendants immediately restore improperly removed fence at Right of Way B and ROW2 as well as other fencing improperly damaged or removed by Defendants;

10. Enter a declaratory judgment determining the rights of the parties and declaring that Plaintiffs' fences do not intrude or encroach on Defendant's property;

11. Enter a judgment that Defendants were engaged in trade and commerce and that Defendants' actions were willfully deceptive, ordering treble damages to Plaintiffs;

12. Order Defendants to pay Plaintiffs' reasonable costs and attorneys' fees;

13. Grant such further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Mass. R. Civ. P. 38, Plaintiffs demand a trial by jury as to all issues so triable.

Respectfully submitted,

FIRST AMERICAN REALTY, INC., HOPEDALE PROPERTIES, LLC, and HOPEDALE INDUSTRIAL CENTER, LLC

By their attorneys,

/s/ David E. Lurie

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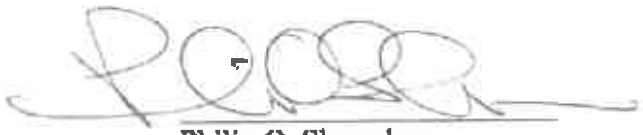
Dated: July 14, 2021

VERIFICATION

I, Philip O. Shwachman, have read the above Verified Complaint and now state, under the penalties of perjury, that the facts stated therein are true to the best of my personal knowledge and that no material facts have been omitted.



Philip O. Shwachman
Dated: 7/14/2021

Exhibit 1

ATTORNEY'S CERTIFICATE OF TITLE

To: Hopedale Properties, LLC

I hereby certify that I have examined the records as indexed in the Worcester County Registry of Deeds, the county in which the premises described herein lies and in the relevant registries of probate, since **September 30, 1968** to six parcels of land in **Hopedale, Worcester County, Massachusetts,** as follows:

(i) 24 Hopedale Street, Parcel 8 containing 27.45 acres, on plan dated December 20, 1978, recorded in Plan Book 471, Plan 62 believed to be Assessors' Map 8, Parcel 140 (excluding Parcel B containing 5.23 or 5.47 acres on plan dated April 8, 1980, recorded in Plan Book 477, Page 30 and excluding Parcel A, containing 40,049 square feet on Plan 477, Plan 44 (Parcel A included, see (iii) below) and excluding a 2511 square foot parcel shown on plan recorded in Plan Book 516, Plan 110);

(ii) 6 Fitzgerald Drive, "Parcel 7, Area=5.99 ± Acres" on plan dated March 13, 1979, recorded in Plan Book 471, Plan 62, believed to be Assessors' Map 11, Parcel 174-1;

(iii) 7 Fitzgerald Drive, "Parcel 'A' A= 40,049± S.F." on "Plan of Land in Hopedale, Mass. dated February 4, 1980, recorded in Plan Book 477, Page 44, believed to be Assessors Map 11, Parcel 173;

(iv) 9 Fitzgerald Drive, "Parcel 6 Area = 1.90± Acres" on Plan 471-62, believed to be Assessors' Map 11, Parcel 173-1;

(v) 4 Fitzgerald Drive (4 Hope Street), "Parcel 2 Area= 40,312 ± S.F. on plan dated August 12, 1976, recorded in Plan Book 694, Plan 31, believed to be Assessors' Map 11, Parcel 176; and

(vi) 32 Cemetery Street, "Parcel 1, Area = 90,661± S.F. or 2.08 ±Acres" on Plan 694-31, believed to be Assessors' Map 11, Parcel 175,

and find good and clear record and marketable title vested in **Hopedale Properties, LLC,**
by deed from Hopedale Industrial Center, Inc. dated December 23, 2005, recorded in Book 38096, Page 151 (24 Hopedale Street, 6 Fitzgerald Drive, 9 Fitzgerald Drive and 7 Fitzgerald Drive); and
by deed from First Parking Corp. dated August 3, 2006, recorded in Book 39569, Page 203 (32 Cemetery Street and 4 Fitzgerald Drive),

subject to the following:

SEE EXHIBIT "B" ATTACHED HERETO

This certification also excludes the following:

Forgery; rights or claims of tenants, lessees, occupants or parties in possession; appurtenant rights; ways or easements not of record; implied easements in other lands; fee and easement of others in ways; accuracy of surveys and of descriptions of buildings and lands; matters which would be disclosed by a personal inspection or accurate survey; requirements and violations of planning board regulations, of zoning or subdivision control laws, or of restrictions; any law, ordinance or governmental regulation regarding environmental protection; or, except as appearing of record in the registry of deeds in the chain of title; liens or rights to liens for labor performed or materials furnished; municipal taxes, assessments, rates and charges; municipal lighting plan rates and charges; condominium common charges; leases for seven years or less; governmental takings or encumbrances not required by law to appear of record in the registries.

The locus parcels have the benefit of the following appurtenant rights of passage over land of the Grafton & Upton Railroad, as more fully set forth in **EXHIBIT A, ATTACHED HERETO:**

1. Reservations set forth in deed from Draper Company to Grafton & Upton Railroad Company dated February 23, 1904, recorded in Book 1774, Page 362, first tract, of a right to cross over the premises conveyed and right of reverter if railroad use abandoned.

2. Grant from Grafton and Upton Railroad dated August 20, 1897, recorded in Book 1546, Page 624 granting rights of way for teams or otherwise over its tracks and location at the center line of Stations 610+24, 617+35, 617+70 and 623+89.

3. Reservation of right of way across the railroad location wherever it shall be agreed to be most convenient for all parties, set forth in deed from William Bancroft et al to Grafton & Upton Railroad Company dated June 14, 1889, recorded in Book 1418, Page 6, approximate location between Station 630 and 631.

4. Reservation of a right of way for teams or otherwise over, across and upon the track, in some convenient place to be designated by Joseph B. Bancroft in deed to Grafton & Upton Railroad Company dated November 2, 1891, recorded in Book 1769, Page 135, location unclear.

Date of completion of title examination: **June 1, 2021**

SIGNED: _____

Nancy Mahoney Harris, Attorney

EXHIBIT A

NARRATIVE REPORT REGARDING RIGHTS OF WAY AND CROSSINGS OVER GRAFTON & UPTON RAILROAD

The locus parcels have the benefit of rights of passage over Grafton & Upton Railroad ("Railroad") land, which rights were reserved in several deeds from Draper Company and its predecessors, to the Railroad. Wherever possible, I have used "Station" numbers in identifying locations on an undated Valuation Map ("Val map") ***Plan 1***. The original layout of G & U was northeast of the present layout and the Val map includes a notation that "G &U R.R. old location abandoned north of Sta. 631+74." The new section is also shown on the Val map as a new baseline, numbers "0" through "23." The new location begins at Station 639, (between "1" and "2") and extends northwesterly crossing the Mill River and Hope Street to Bancroft Parkway. Bancroft Parkway is between Station "23" and "24" and using the old Station numbers approximately between 616 and 617. In addition to the Val map, a Worcester County Commissioners plan ("WCC plan") dated April 7, 1917 (Railroad Plans No. 25, F-1 and F-2) ***Plan 2*** depicts this area.

My search has focused on this section because I have identified four "Travelled Way(s)" which are depicted as a broken lines crossing the G & U right of way. Two of these crossings are located on both sides of the Mill River at Hope Street. The crossing on the easterly side of the Mill River is between Nos. 7 and 8 on the Val map ***Plan 1*** and the crossing on the westerly side of the Mill River is between Nos. 8 and 9. Another "Travelled Way" extends across the railroad west of the "Coal Pocket" between Nos. 17 and 18. The County Commissioners' Plan ***Plan 2*** depicts a fourth "Travelled Way" extending southerly of Depot Street and across the right of way at Station 639 +38.63.

The four crossings are labelled "Travelled Way" on the County Commissioners' Plan ***Plan 2*** and three of the crossings are also depicted as "Traveled Way" on the Val map. ***Plan 1*** The crossings are not shown on the Hopedale Assessors' map but for convenience I have "hi-lited" their approximate location.

Most of land in the locus section was conveyed by deed from Draper Company to Grafton & Upton Railroad Company, dated February 23, 1904, recorded in Book 1774, Page 362 and shown on "Sketch." ***Plan 3*** This land is also shown as "3-137" on the Val map, ***Plan 1*** as land of Draper Company. This parcel extends approximately from the new baseline, Numbers "1" to "25" previously Station 615 to Station 639. The second parcel described in this deed, extends from Station 608 to Station 615, which is west of the locus section.

The deed recites the following:

"The grantor corporation expressly reserves to itself, its successors and assigns, forever the full and perfect right for its officers, employees and agents and for all other persons authorized or permitted by it, to cross at all times over said premises at such places and in such manner as may by it be deemed necessary, desirable or proper, and especially fully reserving whatever rights of passage now exist or are in habitual use over said premises for any purpose whatsoever, the

exercise of all said rights, however, always to be consistent with the full and perfect use of said premises for all railroad purposes."

Additionally, the deed included a right of reverter, reciting: "This deed is made upon the express condition that said tracts of land shall be exclusively used as a railroad location; and said Grafton & Upton R.R. Co. covenants and agrees that, if said tracts shall ever be abandoned for such usages, it will at once reconvey said tracts to said grantor, its successors and assigns."

I found several other deeds to G & U which stated that the deed was a conveyance of land previously taken by the railroad and now being conveyed by deed. These deeds include a reservation of a right of way over the railroad location and the consideration for the conveyance of the land to the railroad appears to be the reservation of the right of way.

A deed from William Bancroft and Joseph B. Bancroft, predecessor in title to Draper Company, conveyed land which had previously been taken by the G & U Railroad, by deed dated June 14, 1889, recorded in Book 1418, Page 6. The deed reserved "a right of way across the said railroad location wherever it shall be agreed to be most convenient for all parties." The land benefited by this right of way was subsequently conveyed to Draper Company by deed dated October 9, 1897, recorded in Book 1559, Page 69.

A deed from Joseph B. Bancroft to G & U dated November 2, 1891, recorded in Book 1769, Page 135, conveyed parcels previously taken by the railroad, including a 3 acre strip 5 rods wide and reserving, "a right of way for teams or otherwise over, across and upon said second tract, in some convenient place to be designated by him. It being a condition of this deed that said Railroad Company will build, construct and forever maintain a good and sufficient farm crossing over said railroad upon the way above reserved."

An Agreement between Draper Company and G & U, dated August 20, 1897, recorded in Book 1546, Page 624, referenced crossings that were not shown on County Commissioners' plan due to clerical error. G & U conveyed rights of way, "for teams or otherwise over its tracks and location." The crossings were at Station 610 +24, 617+35 and 617+70 and 623+89 and "are to be, so far as we can give authority therefore, free and unobstructed." Station 610 is northwest of our locus but Station 617 is at Bancroft Parkway and Station 623 is between Bancroft Parkway and Hope Street. It is unclear however, whether these crossings were over the abandoned portion of the G & U right of way or over the locus section.

I note undated Atlas shows a road depicted by a broken line extending from Depot Street to Cemetery Street and appears to extend over the G & U right of way. This "road" is not shown on any subsequent plans.

EXHIBIT B

1. Mortgage-Security Agreement from Hopedale Industrial Center, Inc. to Philip O. Shwachman, dated January 3, 1990, recorded in Book 12565, Page 179, in the original principal amount of $1 million, assigned to Worcester Capital Corp. by Assignment dated March 24, 2009, recorded in Book 43989, Page 23.

2. Obligations arising out of ownership of the water rights appurtenant to the mill complex noted in a deed to Hopedale Realty Trust dated January 4, 1980, recorded in Book 6905, Page 311 and to Draper Renovation Associates, Inc. dated March 1, 1985, recorded in Book 8707, Page 24 and dated January 3, 1990, recorded in Book 12573, Page 365.

3. Grant of a sewer easement to W.G.B. Construction Co. & Inc. dated September 16, 1986, recorded in Book 10663, Page 109.

4. Easement for the construction and maintenance of a sewage disposal plant and for sewer pipes granted to the Town of Hopedale by deed dated October 20, 1908, recorded in Book 1891, Page 89, affecting Parcels 6 and 7 on Plan 471-62, includes appurtenant rights to tie into sewer pipes.

5. Easement for poles and wires granted Massachusetts Electric Company and New England Telephone and Telegraph Company dated April 4, 1980, recorded in Book 6981, Page 375.

6. Decision of the Hopedale Zoning Board of Appeals dated May 29, 1980, recorded in Book 7012, Page 61.

7. Reservations and grants of rights and easements in deed dated July11, 1980, recorded in Book 7012, Page 80, conveying a portion of Parcel 8 on Plan 471-62.

8. Obligations under and provisions of a Party Wall Agreement dated July 11, 1980, recorded in Book 7012, Page 88.

9. Rights and easements dated July 11, 1980, recorded in Book 7013, Page 289, which includes a portion of Parcel 8 on Plan 471-62.

10. Easement for poles and wires granted to Milford Electric Light and Power Company dated May 9, 1945, recorded in Book 2958, Page 248.

11. Easement for use for Town purposes granted the Town of Hopedale dated July 17, 1908, recorded in Book 1883, Page 570.

12. Grant to the Grafton and Upton Railroad of all interest in rails and railroad appliances dated June 26, 1916, recorded in Book 2115, Page 192.

13. Easement for poles, wires and conduits to Milford Electric Light and Power Company dated October 16, 1935, recorded in Book 2653, Page 595.

14. Easement for poles and wires to Milford Electric Light and Power Company dated November 27, 1941, recorded in Book 2842, Page 492.

15. Easement to Grafton and Upton Railroad near the westerly end of Depot Street dated March 25, 1967, recorded in Book 4752, Page 403.

16. Easement for cables and conduits granted to American Telephone and Telegraph Company dated July 18, 1966, recorded in Book 4764, Page 407.

17. Easement for drainage system granted to the Town of Hopedale dated December 15, 1955, recorded in Book 3661, Page 99.

18. Easement for poles and wires to Worcester County Electric Company dated May 31, 1960, recorded in Book 4122, Page 554.

19. Encroachments shown on Plan 471-62, of buildings, chain link fence, propane storage tank and spur track onto land of Grafton and Upton Railroad.

20. Right of way reserved in deed to Draper Company dated January 1, 1897, recorded in Book 1559, Page 25.

21. Water pipe rights of Milford Water Company in deed to Draper Company dated January 1, 1897, recorded in Book 1559, Page 69.

22. Right of way and Sewer rights in deed to Draper Company dated January 1, 1897 recorded in Book 1559, Page 57 and described in deed in Book 1481, Page 248, affecting Parcel 8 on Plan 471-62.

23. Rights of others in and to portions of locus located within the bounds of the Mill River and rights of others in the uninterrupted flow of the Mill River.

24. Easements, rights of way and agreement concerning fire prevention water in deed to Lake Wales Realty Co. dated January 10, 1985, recorded in Book 6908, Page 97 as affected by Easement Agreement recorded in Book 5221, Page 60.

25. Grant of Easement of Ingress and Egress (32 Cemetery Street and 4 Fitzgerald Drive) dated February 17, 1977, recorded in Book 6127, Page 129 and reservation of easement recorded in Book 6127, Page 122.

26. Special Permit from Hopedale Zoning Board of Appeals dated January 17, 1985, recorded in Book 8548, Page 330 (32 Cemetery Street and 4 Fitzgerald Drive.)

27. Notice of Activity and Use Limitation, Hopedale Terminal, 32 Cemetery Street, Lot 11-175 dated November 18, 1996, recorded in Book 18413, Page 386 as affected by Termination of Notice of Activity and Use Limitation dated July 25, 2018, recorded in Book 59151, Page 374.

28. Grant of Easement by the Grafton and Upton Railroad Company dated April 4, 2001, recorded in Book 23902, Page 301 for "Building Encroachment" shown as Parcel A on Plan 767-87, (7 Fitzgerald Drive).

29. Limited liability agreement of Hopedale Properties, LLC referenced in deed dated August 3, 2006, recorded in Book 39569, Page 201, regarding limitations on liabilities of series, as shown on Schedule B (32 Cemetery Drive, Series N and 4 Fitzgerald Drive, Series O).

30. Rights of others in portions of 6 Fitzgerald Drive, Lot 11-174-1 within the bounds of Fitzgerald Drive.

31. Easement Agreement dated April 15, 2014 recorded in Book 52221, Page 60 modifying and terminating easements set forth in Book 6908, Page 97 and granting easement over "Right of Way A" on Plan 471-61 to Grafton & Upton Railroad and Mt. Waldo Operations Inc.

32. Order of Conditions, Map 8, Lot 140 dated September 6, 2018, recorded in Book 59578, Page 47 as affected by Certificate of Compliance dated November 19, 2019, recorded in Book 61561, Page 294.

NOTE: Notice to prevent easement regarding pipes by Milford Gas Light Company dated December 4, 1906 recorded in Book 1844, Page 312.

Notice to prevent easement, right of way or other adverse use dated September 20, 2000, recorded in Book 23141, Page 81 (32 Cemetery Street and 4 Fitzgerald Drive.)

Notice to prevent easement, right of way or other adverse use dated July 26, 2006, recorded in Book 39656, Page 22.

in presence of

Worcester Five Cents Savings Bank (seal)
J. Stewart Brown, Treas.

Worcester ss. February 25, 1904, 18. Then the above named J. Stewart Brown, Treasurer, acknowledged the above instrument to be the free act and deed of the Worcester Five Cents Savings Bank, before me,

Burton W. Grout, Justice of Peace.

Rec'd Feb. 25, 1904, at 3h. 6m. P. M. Ent'd & Ex'd.

Attest: Daniel Hunt Register.

Draper Co.

to

Grafton & Upton R. R. Co.

K N O W A L L M E N B Y T H E S E P R E S E N T S that the Draper Company, a corporation duly established by law and having its usual place of business in Hopedale, in County of Worcester and in the Commonwealth of Massachusetts, in consideration of one dollar, to it paid by the Grafton & Upton Railroad Company, a corporation duly established under laws of said Commonwealth, the receipt whereof is hereby acknowledged, doth hereby G I V E, G R A N T, B A R G A I N, S E L L and C O N V E Y unto the said Grafton and Upton Railroad Company, a certain tract of land, situated in said HOPEDALE, on the westerly side of the Grafton & Upton Railroad, bounded and described as follows, viz:- Beginning at a point on the westerly line of said railroad location, at land of Patrick Moore and said Draper Company, about one hundred fifty-two feet, measured on the center line, from the southerly side of the Hopedale Depot, and being station 639+44.63 on plan of original taking filed May 21, 1889; thence S. 53° 30' W. sixteen feet by land of said Moore; thence northerly, on curve of 9° 20' to the left, one hundred fifty-five feet by land of grantor; thence N. 59° 9' W. two hundred forty-nine 93/100 feet by land of grantor; thence northerly, on curve of 6° 50' to the right, three hundred ten 11/100 feet by land of grantor; thence N. 38° W. five hundred thirty-three 74/100 feet by land of the Hopedale Stable Company; thence northerly, on curve of 4° 54' to the right, three hundred eighty 45/100 feet by land of the Hopedale Stable Company and grantor; thence N. 19° 20' W. fifty-three feet by land of grantor; thence northerly, on curve of 8° 15' to the left, three hundred twenty-four 31/100 feet by land of grantor; thence N. 46° 7' W. sixty-seven 87/100 feet by land of grantor; thence northerly, on curve of 5° 56' to the right, three hundred fifty-six 64/100 feet by land of grantor; thence N. 32° 4' W. one hundred eighty feet by land of grantor to the westerly line of the said railroad location and being station 613+78 on plan of original taking; the last ten lines herein described being parallel and twenty-two feet westerly from the center line

of the grantee's track, as now laid and constructed; thence southerly on said westerly line four hundred fifteen feet to the southerly side of the Bancroft Parkway crossing, so called; thence westerly on line of said crossing, about twenty-seven feet by land of grantor; thence southerly, on curve of 4° 2' to the left, one hundred ten feet by land of grantor; thence S. 46° 7' E. sixty-seven 87/100 feet by land of grantor; thence southerly on curve of 7° 55' to the right, three hundred thirty-eight 31/100 feet by land of grantor; The last three lines herein described being parallel and ten 35/100 feet easterly from center line of grantee's track as now laid and constructed; thence southerly one hundred forty feet by land of grantor; thence southerly on curve of 5° 7' to the left two hundred eighty-one 2/10 feet by land of grantor; thence S. 58° E. five hundred thirty-three 74/100 feet by land of grantor; thence southerly on curve of 7° 15' to the left, two hundred ninety-two 91/100 feet by land of grantor; thence S. 59° 9' E. three hundred thirty-three 43/100 feet by land of grantor to the westerly line of said railroad location. The last four lines herein described being parallel and twenty-five feet easterly from the center line of the grantee's track as now laid and constructed; thence S. 28° 30' E. eighty-nine feet on the westerly line of said railroad location to the place of beginning. Said tract is conveyed subject to all rights and privileges of the Milford & Uxbridge Street Railway Company over any portion of the same. The grantor corporation expressly reserves to itself, its successors and assigns, forever the full and perfect right for its officers, employees and agents and for all other persons authorized or permitted by it, to cross at all times over the said premises, at such places and in such manner as may by it be deemed necessary, desirable or proper, and especially fully reserving whatever rights of passage now exist or are in habitual use over said premises for any purpose whatsoever, the exercise of all said rights, however, always to be consistent with the full and perfect use of said premises for all railroad purposes. All the land herein conveyed is the same as appears on a plan thereof made by H. L. Dunn, C. E. dated January 14, 1904.

Also a second tract of land, situated in said HOPEDALE and described as follows, viz:- Beginning at a point on the easterly line of the location of said railroad at Station Number 615 on plans as filed May 21, 1889; thence running northerly by said easterly line of location six hundred sixty feet to station number 608+40; thence turning and running easterly at right angles to said location line, ten feet; thence turning and running southerly parallel to said location line and ten feet distant therefrom, six hundred feet; thence turning and running southeasterly sixty

feet; thence turning and running westerly forty feet to the place of beginning. This deed is made upon the express condition that said tracts of land shall be exclusively used as a railroad location; and said Grafton & Upton R. R. Co. covenants and agrees that, if said tracts shall ever be abandoned for such usages, it will at once reconvey said tracts to said grantor, its successors and assigns.

T O H A V E and T O H O L D the granted premises, with all the privileges and appurtenances thereto belonging, to the said Grafton & Upton R. R. Co. and its successors and assigns, to their own use and behoof forever. And the said corporation hereby covenants with the grantee and its successors and assigns that it is lawfully seized in fee simple of the granted premises; that they are free from all incumbrances that it has good right to sell and convey the same as aforesaid; and that it will W A R R A N T and D E F E N D the same to the grantee and its successors and assigns forever against the lawful claims and demands of all persons.

I N W I T N E S S W H E R E O F the said Draper Company has caused its corporate seal to be hereto affixed and these presents to be signed in its name and behalf by Geo. A. Draper, its Treasurer hereto duly authorized, this 25d day of February in the year one thousand nine hundred four.

Signed and sealed in presence of

E. D. Brancroft — Draper Company (seal)

By Geo. A. Draper, Treas.

Commonwealth of Massachusetts.

Worcester ss. Hopedale, Feb. 25d, 1904. Then personally appeared the above named Geo. A. Draper and acknowledged the foregoing instrument to be the free act and deed of the Draper Company, before me,

E. D. Bancroft, Justice of the Peace.

Certificate.

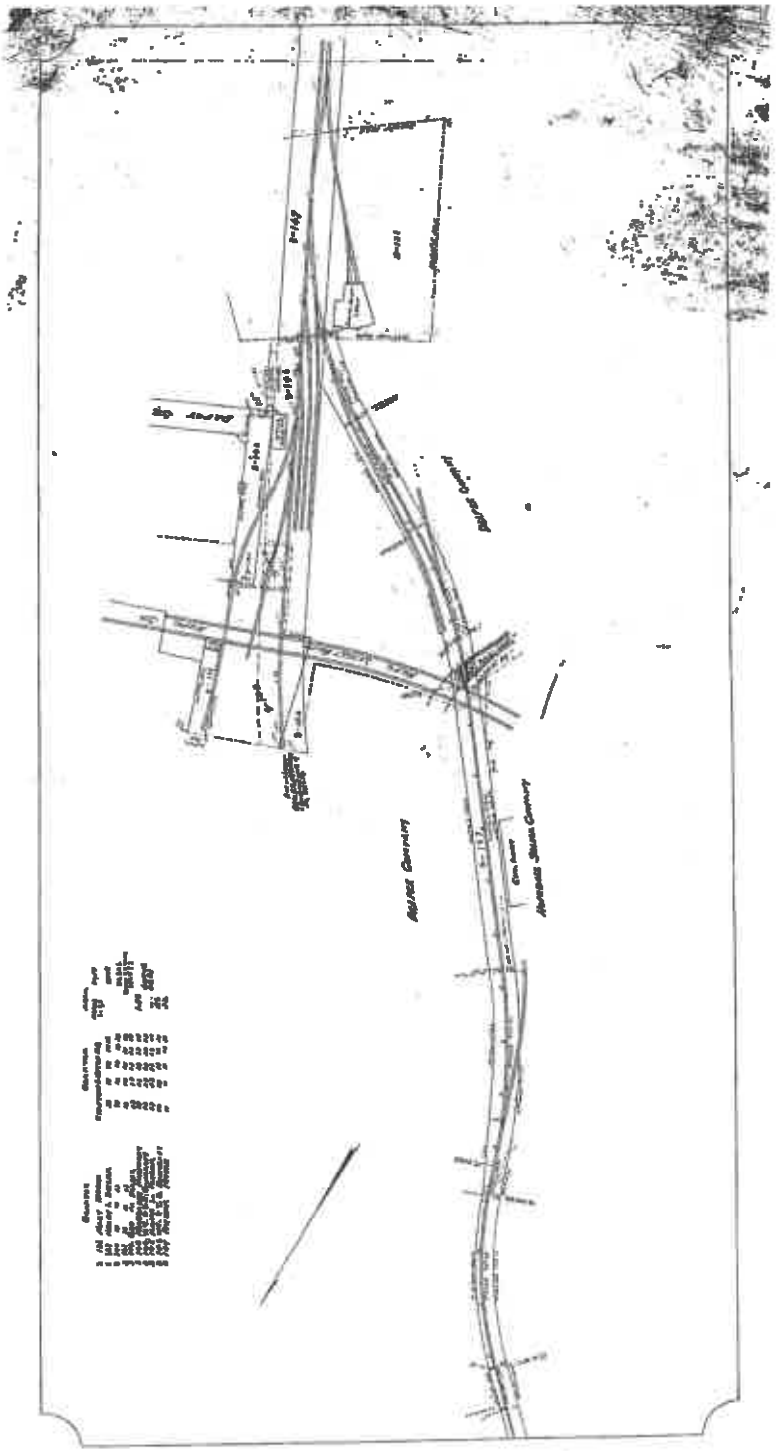
At a meeting of the Directors of the Draper Company held at Hopedale on the 25d day of Feby. A. D. 1904, the foregoing deed having been presented read and considered it was,

VOTED: that the Treasurer George A. Draper be and he is hereby authorized and directed to execute, acknowledge and deliver in the name of and on the behalf of this company the deed presented to this meeting made to the Grafton & Upton R. R. Co. and covering land to be used for their new location according to a plan made by H. L. Dunn, C. E. dated Jan. 14, 1904.

Attest: E. D. Bancroft, Asst. Clerk of the Draper Company.

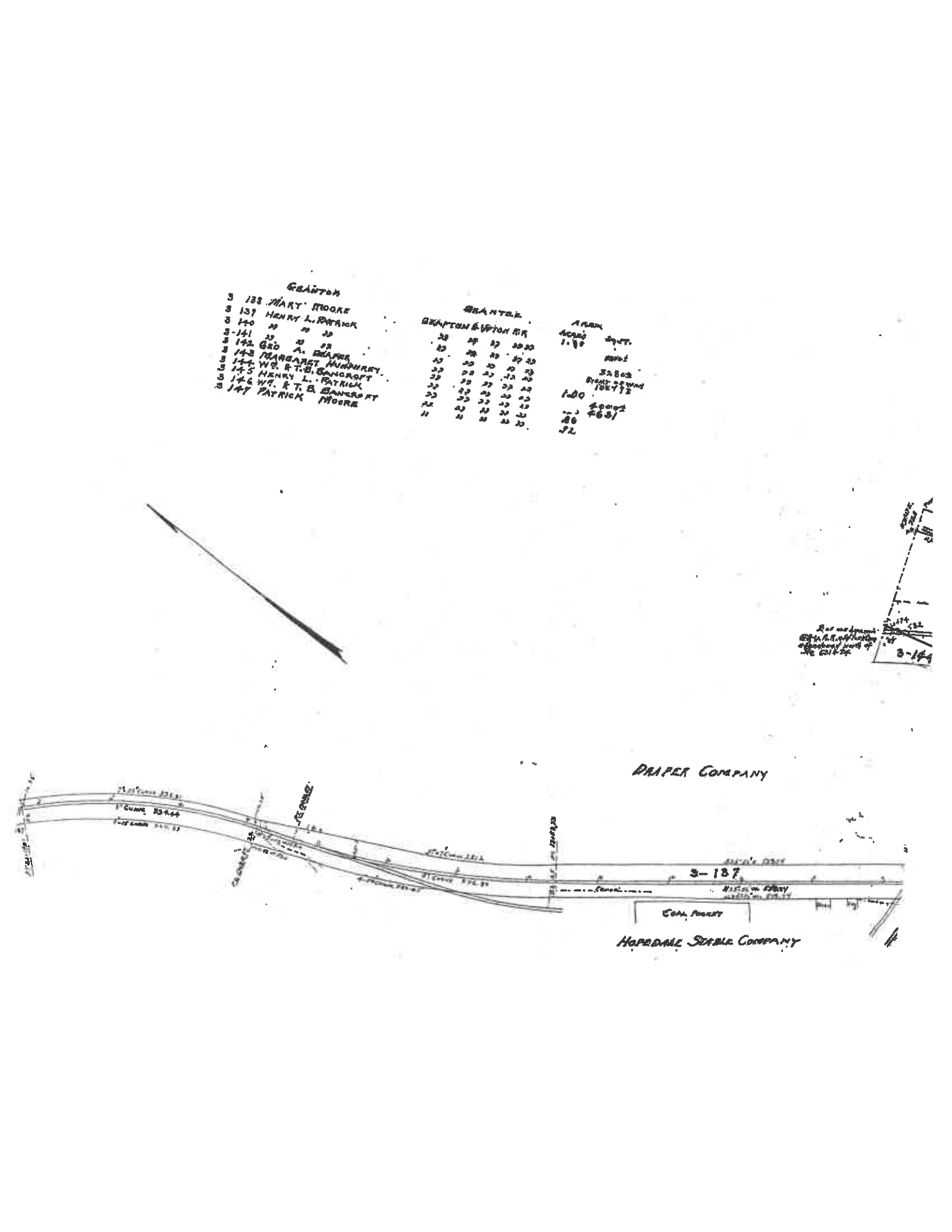
Rec'd Feb. 25, 1904, at 3h. 12m. P. M. Ent'd & Ex'd.

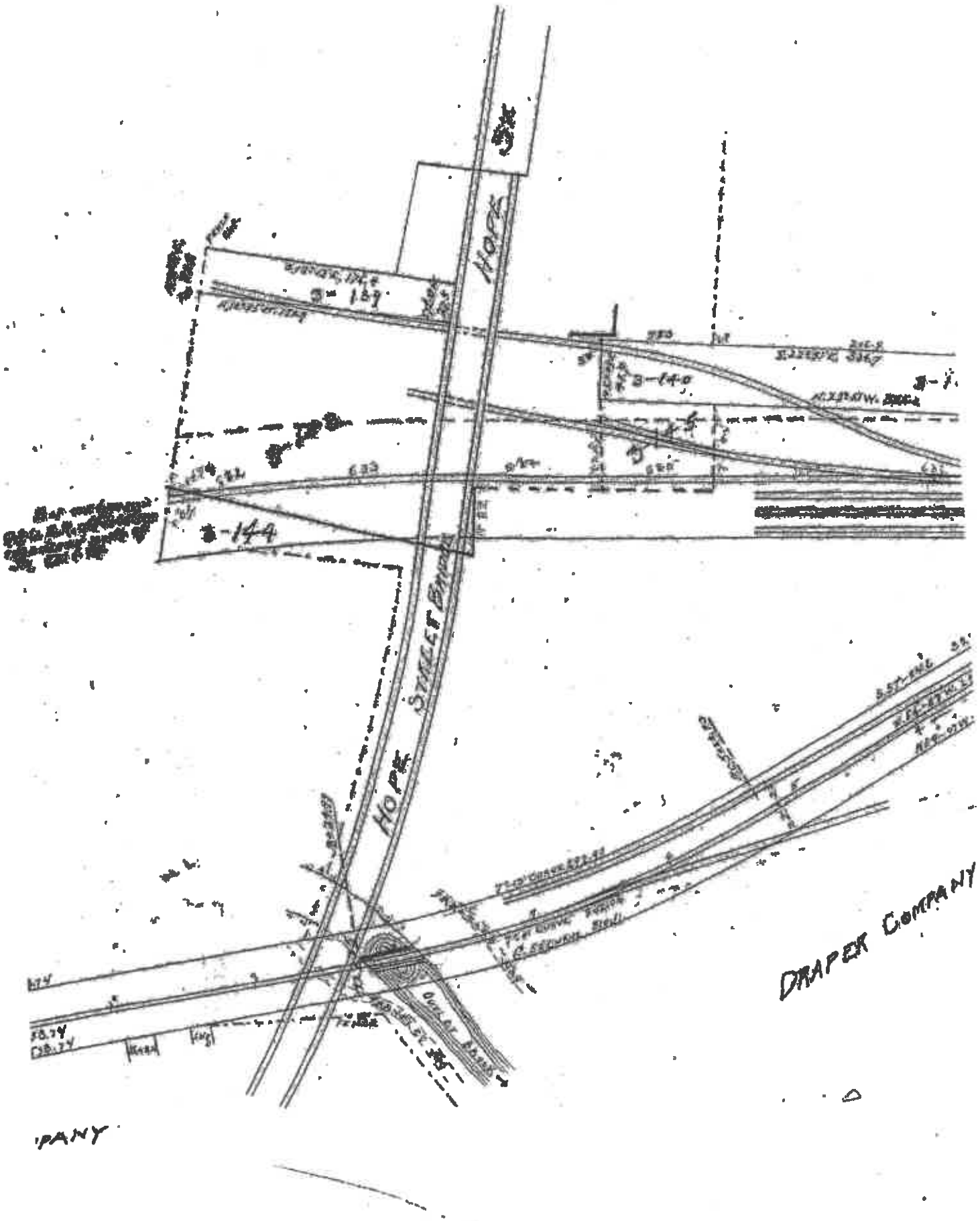
Attest: Daniel Hunt Register.

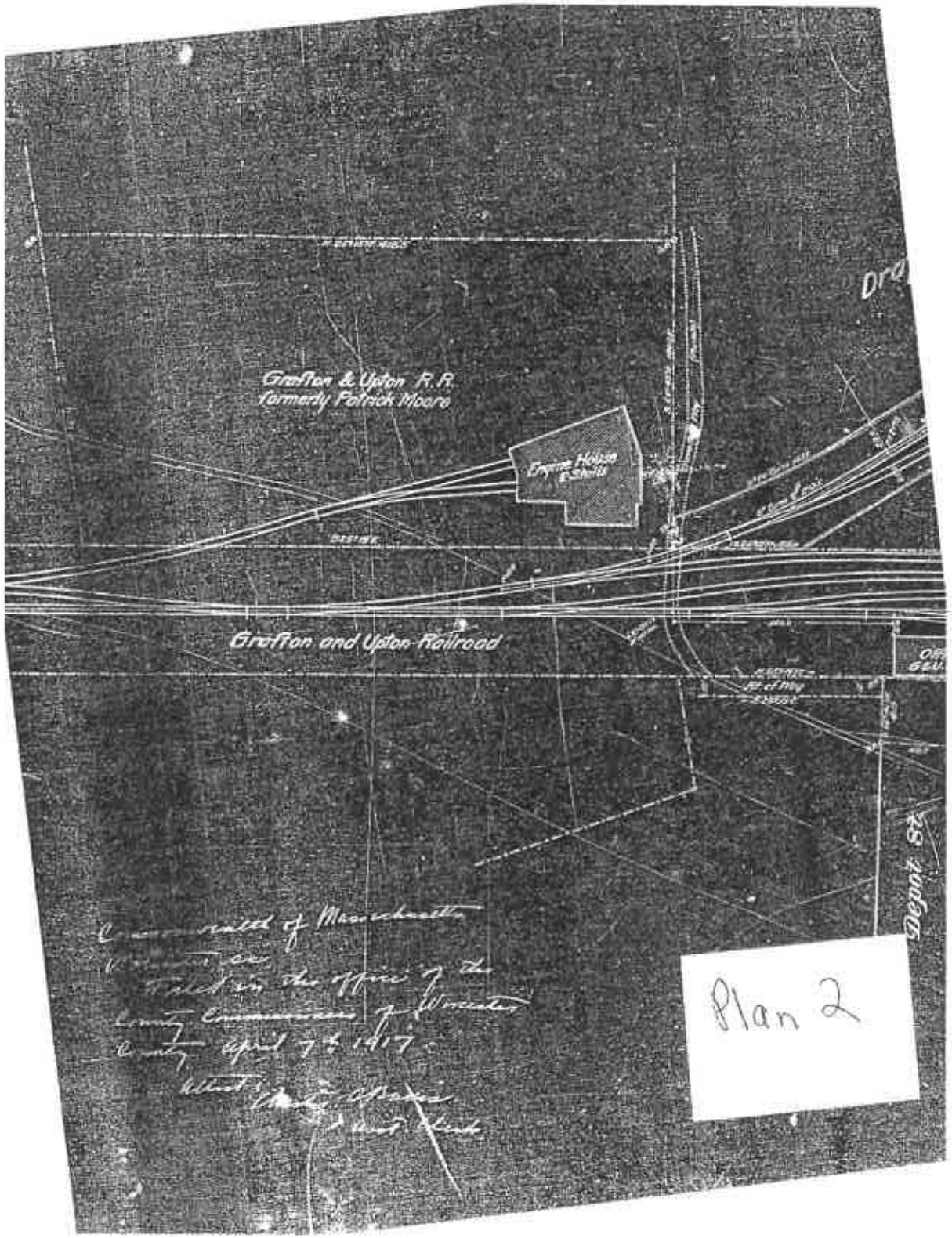


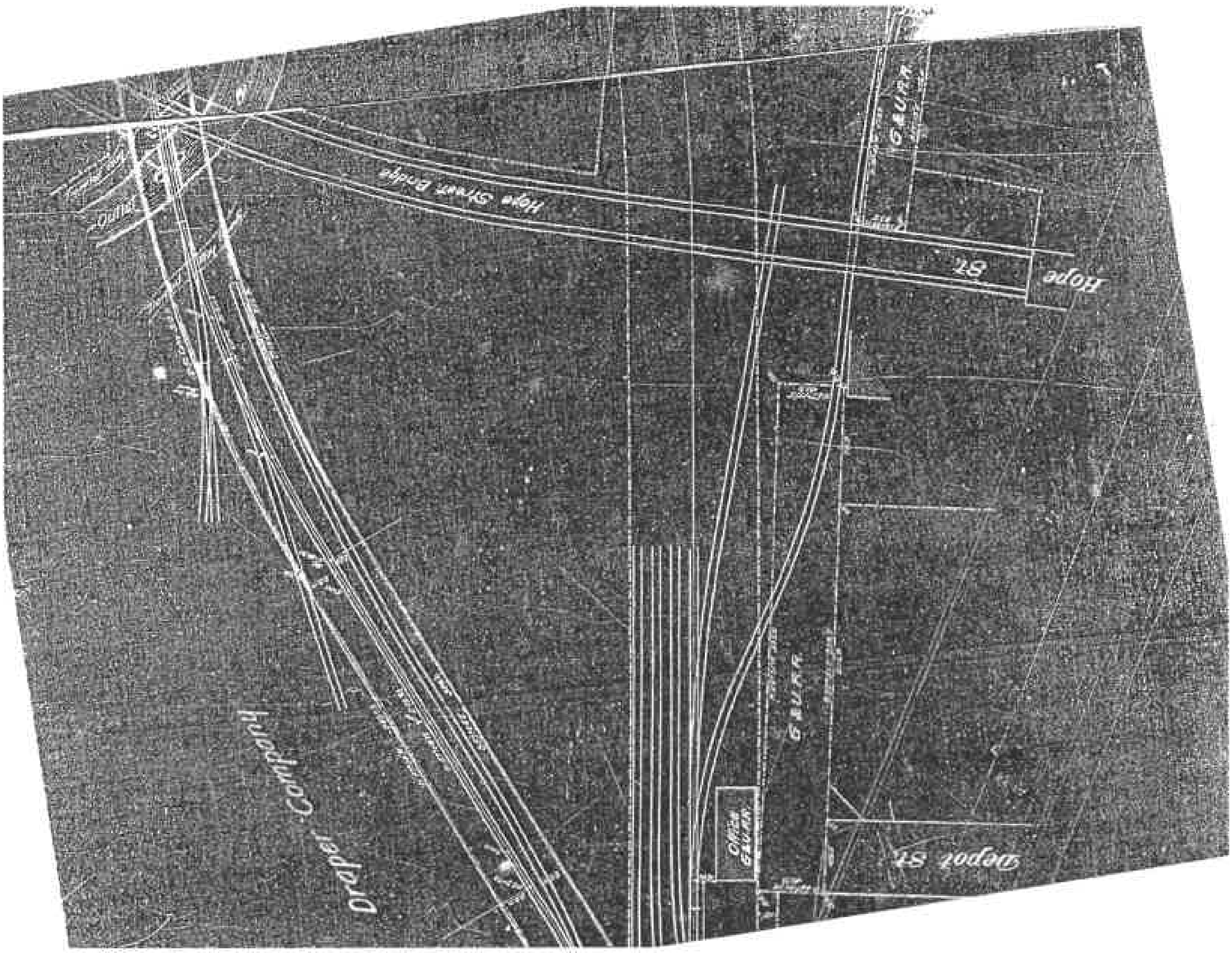
Val Map

Plan 1


GRANTOR
3 138 MARY MOORE
3 137 HENRY L. PATRICK
3 140 " "
3-141 " "
3 142 GEO A. GRAPES
3 143 MARGARET HUMPHREY
3 144 W.S. & T.B. BANCROFT
3 145 HENRY L. PATRICK
3 146 W.S. & T.B. BANCROFT
3 147 PATRICK MOORE
GRANTEE
GRAFTON & UPTON RR
ACRES
1.90
1.80
.86
.52
3-144
3-137
DRAPER COMPANY
COAL FOREST
HOPEDALE STEEL COMPANY


HOPE
HOPE STILLET BRICK
B-144
DRAPER COMPANY


Grafton & Upton R.R.
formerly Patrick Moore
Engine House
Grafton and Upton Railroad
Plan 2


Hope Street Bridge
Hope St.
Depot St.
Draper Company

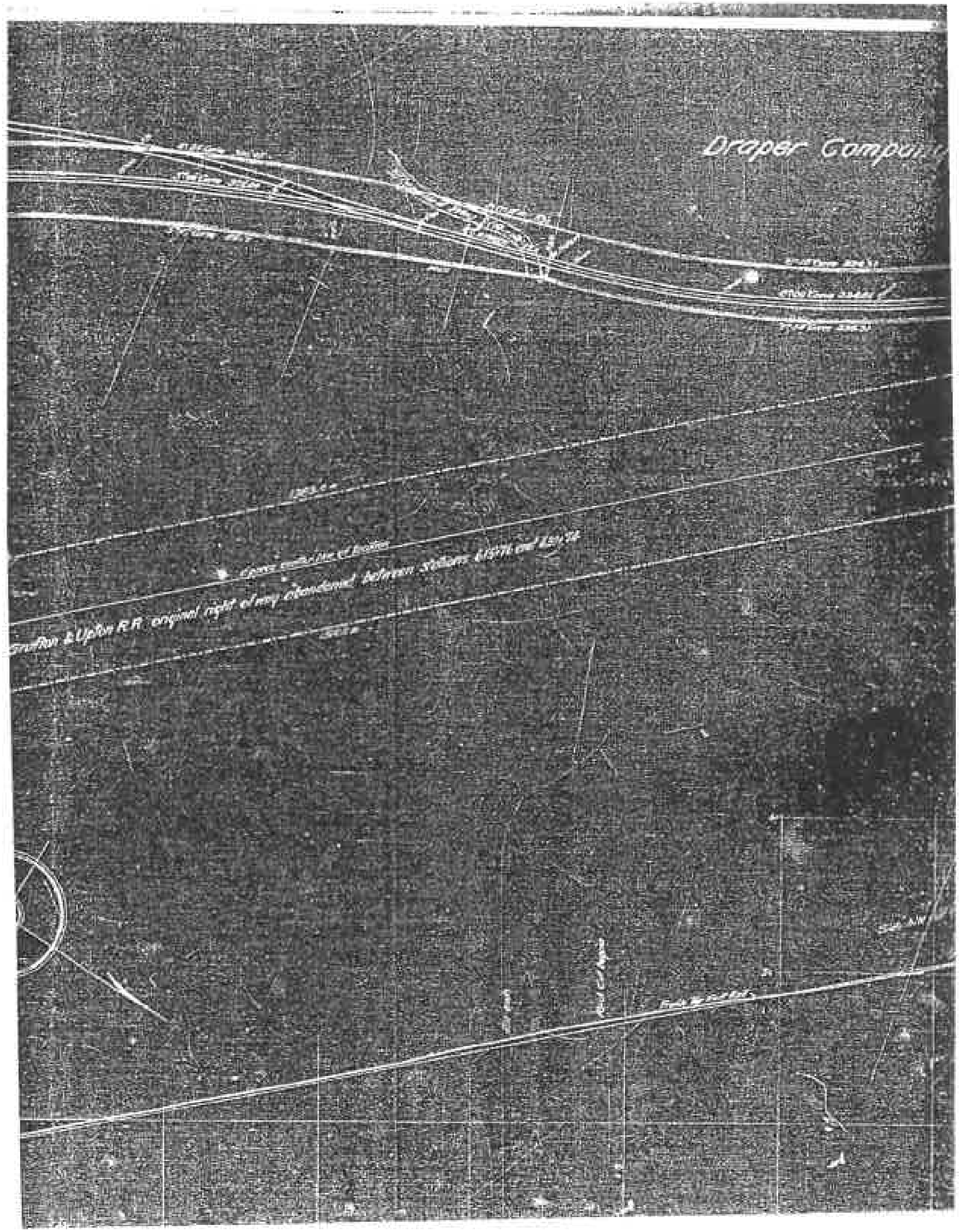

Draper
Upton R.R. original right of way abandoned between Stations

Exhibit 2

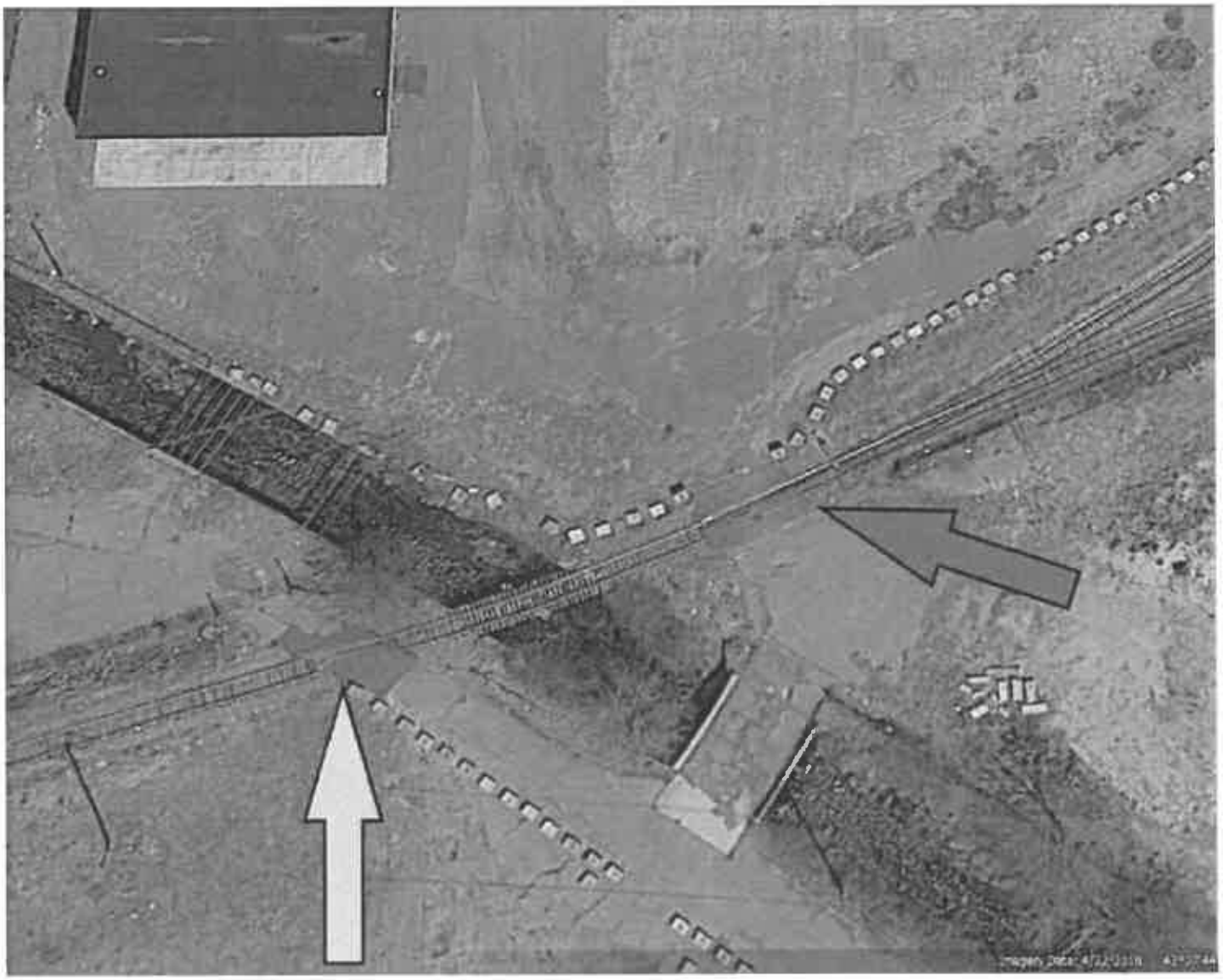


Exhibit 15

GRANT DEED

Louis Pemstein, Alan Feingold, Manuel Sigal, Harry Friedberg, I. Tutter Burwick and N. Bernard Pemstein, as they are Trustees of Hopedale Realty Trust under a Declaration of Trust dated June 28, 1979, and recorded in the Worcester District Registry of Deeds, Book 6799, Page 243, as amended and restated by an Amendment and Restatement of said Trust dated January 3, 1983, and recorded in the Worcester District Registry of Deeds, Book 7560, Page 183, of 76 Mill Street, Worcester, Worcester County, Massachusetts, for consideration paid, and in full consideration of: less than One Hundred and 00/100 Dollars
grants to Hopedale Industrial Center, Inc., a Massachusetts corporation with a principal place of business at c/o First American Realty, P.O. Box 1488, Worcester, Massachusetts 01601.

Mill Pond, Hopedale

All the water rights and obligations appurtenant thereto arising out of ownership of land in Hopedale, Massachusetts, more particularly described in a deed from Louis Pemstein, Alan Feingold, Manuel Sigel, I. Tutter Burwick and N. Bernard Pemstein Trustees of Hopedale Realty Trust to Hopedale Industrial Center, Inc., dated January 3, 1990 and recorded in Worcester District Registry of Deeds as instrument number 1345, and grant to Louis Pemstein, Hyman Burwick, Saul Feingold, Manuel Sigel and Harry Friedberg as Trustees of Hopedale Realty Trust from Rockwell International Corporation dated January 4, 1980, and recorded in the Worcester District Registry of Deeds in Book 6905 Page 311.

3.1256
P. 158

all in Hopedale

water rights

This instrument creates no new boundaries.

This grant is without covenants or warranties.

Witness my hand and seal this 3rd day of January, 1990.

Alan Feingold, Trustee
Alan Feingold, Trustee and
Not Individually

See section V.A. for the authority of the Trustee to act on behalf of the Trust.

JAN 12 3 13 PM '90

COMMONWEALTH OF MASSACHUSETTS

Worcester, ss

Then personally appeared the above named Alan Feingold and acknowledged the foregoing instrument to be his free act and deed, as Trustees of Hopedale Realty Trust, before me

Therese V. Grimes
THERESE V. GRIMES Notary Public
My Commission Expires: 10/14/94

ATTEST: WORC., Anthony J. Vigliotti, Register

Bk: 38096 Pg: 151 Doc: DEED
Page: 1 of 24 12/27/2005 12:16 PM

Hopedale, Massachusetts

QUITCLAIM DEED

HOPEDALE INDUSTRIAL CENTER, INC., a Massachusetts corporation, with an address at 100 Central Street, P.O. Box 646, Worcester, Massachusetts 01613 for consideration paid and in full consideration of less than One Hundred ($100.00) Dollars, grants to HOPEDALE PROPERTIES, LLC, a Delaware limited liability company with an address c/o First American Realty, Inc., Manager at 100 Central Street, P.O. Box 646, Worcester, Massachusetts 01613 with Quitclaim Covenants the land and buildings with all rights and obligations appurtenant thereto as described in:

Schedules A, B, C, D, E and F hereto.

This conveyance is subject to and with the benefit of all easements, restrictions, encumbrances and other matters of record to the extent the same are in force and applicable.

The within conveyance does not constitute a transfer of all or substantially all of the Grantor's assets in the Commonwealth of Massachusetts.

This conveyance is subject to a first mortgage dated January 3, 1990 to Philip O. Shwachman and recorded with the Worcester District Registry of Deeds in Book 12565, Page 179, as amended and assigned of record, having an outstanding principal balance of $1,246,760.00, which the Grantee assumes and agrees to pay.

The Grantee hereto, Hopedale Properties, LLC, is a Delaware limited liability company. Pursuant to section 18-215 of the Delaware Limited Liability Company Act, the limited liability company agreement has established multiple series, and notice of the limitations on liabilities of a series is provided that the debts, liabilities and obligations incurred, contracted for or otherwise existing with respect to a particular series shall be enforceable against the assets of such series only, and not against the assets of the limited liability company generally or any other series thereof.

Executed as an instrument under seal this 23rd day of December, 2005.

HOPEDALE INDUSTRIAL CENTER, INC.

By: _____
Philip O. Shwachman, President and Treasurer

[ACKNOWLEDGEMENT ON NEXT PAGE]

Return to:
Hopedale Properties, LLC
c/o First American Realty, Inc
P.O. Box 646
Worcester, MA 01613-0645

24 pgs

SCHEDULE F

Property Address: Hopedale, Massachusetts	Hopedale Assessors Atlas 9/87, revised 9/30/02	Applicable Series
105 Freedom Street	771 Acres, Sheet 8, Parcel 141	A
12 rear Bancroft Park	.371 Acres, Sheet 11, Parcel 203	B
9 Fitzgerald Drive	1.617 Acres, Sheet 11, Parcel 173-1	C
6 Fitzgerald Drive	5.990 Acres, Sheet 11, Parcel 174-1	D
24 Hopedale Street	21 003 Acres, Sheet 8, Parcel 140	E
Water Rights	not shown	F
21 Lake Street	1.430 Acres, Sheet 8, Parcel 195	G
23 Hopedale Street	1.005 Acres, Sheet 11, Parcel 97	H
49 Prospect Street	.679 Acres, Sheet 11, Parcel 152	I
52 Prospect Street	6 424 Acres, Sheet 11, Parcel 99	J
85 Freedom Street	5.470 Acres, Sheet 8 Parcel 140-1	K
11 Fitzgerald Drive	25,742 sq. ft., Sheet 11, Parcel 173-2	L
7 Fitzgerald Drive	40,349 sq. ft., Sheet 11, Parcel 173	M

The Grantee hereto, Hopedale Properties, LLC, is a Delaware limited liability company. Pursuant to section 18-215 of the Delaware Limited Liability Company Act, the limited liability company agreement has established multiple series, and notice of the limitations on liabilities of a series is provided that the debts, liabilities and obligations incurred, contracted for or otherwise existing with respect to a particular series shall be enforceable against the assets of such series only, and not against the assets of the limited liability company generally or any other series thereof.

ATTEST: WORC. Anthony J. Vigliotti, Register

Exhibit 16

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
THE DEPARTMENT OF ENVIRONMENTAL PROTECTION
One Winter Street, Boston, MA 02108

The Office of Appeals and Dispute Resolution

In the Matter of Hopedale Properties LLC	OADR Docket No. WET-2019-013 DEP File No.: Superseding Determination of Applicability - Positive Hopedale, MA

PETITIONER'S MOTION FOR SUMMARY DECISION

Petitioner Gerrity Companies Incorporated ("Petitioner") hereby moves for a summary decision in the above-referenced matter vacating the Superseding Determination of Applicability (the "SDA") issued by the Central Regional Office of the Massachusetts Department of Environmental Protection (the "Department") to Applicant Hopedale Properties LLC ("Applicant") on April 23, 2019 in connection with real property located at 1 Fitzgerald Drive, Hopedale, Massachusetts (the "Hopedale Railyard" or the "Premises"). As set forth herein, as a matter of law, the Department's enforcement of the Massachusetts Wetlands Protection Act, Mass. Gen. Laws c. 131, § 40 (the "MWPA"), and the Wetlands Regulations, 310 CMR 10.00 *et seq.* (the "Wetlands Regulations") with respect to the Hopedale Railyard is preempted by 49 U.S.C. § 10501. There is no genuine issue of material fact that the Hopedale Railyard is used for transportation by rail carrier and, therefore, it is under the exclusive jurisdiction of the Surface Transportation Board (the "STB"). Further, as a matter of law, 49 U.S.C. § 10501 preempts the MWPA and Wetlands Regulations because they interfere with a railroad's ability to construct facilities and conduct economic activities.

I. UNDISPUTED MATERIAL FACTS

History of Grafton & Upton Railroad and Hopedale Railyard

1. The Grafton & Upton Railroad[1] (the "G&U") is a historical transportation institution, having been founded in 1874 as a narrow-gauge steam railroad connecting to the Boston and Albany Railroad. Affidavit of Jon Delli Priscoli ("Delli Priscoli Aff.") ¶5.

2. At the height of building the rail line there was no power equipment available and, at that time, approximately 300 men and 75 teams of horses worked in three separate gangs to build the railroad. *Id.* ¶6.

3. Over the next century, the G&U made necessary changes to keep up with the times, first transitioning to electric power in 1919, and then to diesel in 1946. *Id.* ¶7.

4. Since it opened, the G&U has had several owners, including the Draper Company. *Id.* ¶8.

5. In 1988, the G&U stopped running trains to the Hopedale railyard, which fell into disrepair and became overgrown. *Id.* ¶9.

New Ownership of the G&U

6. In 2008, Jon Delli Priscoli ("Mr. Delli Prescoli") purchased the G&U with the intention of revitalizing the G&U in its entirety from Grafton to Milford. At the request of the sellers the acquisition was in two phases, purchasing 50% in 2008 and the remaining 50% in 2009. During this period of time the officers of the company remained the same; however, Mr. Delli Priscoli was given full authority to commence the intended revitalization of the Hopedale Railyard and the G&U's railroad operations. *Id.* ¶10.

[1] G&U was chartered as the Grafton Centre Railroad and changed its name in 1888.

7. The Hopedale Railyard is located on real property owned by Gerrity Co., as successor in interest to MT. Waldo Operations, Inc. ("MT. Waldo"). Affidavit of Peter F. Gerrity ("Gerrity Aff.") ¶3.

8. On or about June 8, 2018, Gerrity Co. through merger, acquired the Premises and all other assets of MT. Waldo, with a deed conveying the Hopedale Railyard to Gerrity Co. being recorded in the Worcester Registry of Deeds in Book 58535, Page 143. *Id.* ¶5.

9. Gerrity Co. (through its predecessor-in-interest MT. Waldo Operations, Inc.) and the G&U entered into a Lease Agreement for the Hopedale Railyard with the Initial Term commencing on July 1, 2008 for five (5) years with two five (5) year extensions, an option to purchase and a right of first refusal ("Lease"). Gerrity Aff. ¶6; Delli Priscoli Aff. ¶11.

10. The G&U has been and continues to be the sole Tenant at the Premises since July 1, 2008 pursuant to the Lease and the extensions thereto. Furthermore, Gerrity Co. has entered into an Agreement to sell the Premises to the G&U. Gerrity Aff. ¶8; Delli Priscoli Aff. ¶13.

11. Since the Lease commencement in 2008, the G&U has had and has exercised exclusive and complete site control of the Premises as it is a federally regulated operation and pursuant to the Lease the G&U had right to utilize the Premises for all uses anticipated for a railroad operation including rights of preemption. Delli Priscoli Aff. ¶14 Gerrity Aff. ¶9.

12. From the commencement of the Lease to date, the G&U has utilized the Premises specifically for railroad purposes and facilitating interstate commerce as intended, including but not limited to receipt, delivery, transfer in transit, storage, handling and the interchange of property. With all activities at the Premises being under the control and direction of the G&U. Delli Priscoli Aff. ¶15; Gerrity Aff. ¶13.

13. In fact, the G&U's use of the Hopedale Railyard pursuant to the Lease, Section 11.01 Tenant's Business Operations, is "Any lawful purpose including all preemptive railroad uses, and including but not limited to the transferring of all types of municipal waste …." Gerrity ¶10.

14. Prior to and during the Term of the Lease, an abutter, Hopedale Properties LLC, allowed a bridge to deteriorate and placed large cement blocks along the sides of the area of the deeded access and egress easement to the Premises substantially inhibiting the ability for large trucks to access the Premises by creating an extremely tight turning radius through the deeded easement. *Id.* ¶11.

Revitalization of G&U and Hopedale Railyard

15. The track from North Grafton to Hopedale, after 20 years of neglect, had significantly deteriorated, and for safety reasons the track needed to be rebuilt. Delli Priscoli Aff. ¶16.

16. Therefore, beginning in 2008, in order to make the Hopedale Railyard usable and safe, the 20 years of overgrowth was removed. Id. ¶17.

17. The G&U in its expansion efforts of the railroad operations at the Premises and facilitating interstate commerce, pursued burying a drainage ditch that carried drainage from the Town of Hopedale across the Premises to the Mill River. At all times during these activities the G&U kept a representative of Gerrity Co. apprised of their discussions with the Town of Hopedale (the "Town") and Hopedale Conservation Commission (the "Commission") regarding the work being completed. Gerrity Aff. ¶12.

18. In approximately late 2008, the G&U, through its representative and principal, Mr. Delli Priscoli, came to the Town and the Commission to discuss the drainage trench carrying

the Housing Authority's and other Town drainage under the G&U's rail-tracks/bed and across the Premises discharging into the Mill River (the "2018 Revitalization Project"). Delli Priscoli Aff. ¶18.

19. As the G&U was revitalizing, upgrading and expanding its railroad operations at the Premises (which included adjacent land to the rear of the existing building, storage and parking areas, through which the drainage trench ran) including its access and egress to and from the Hopedale Railyard to Rte. 16/Mendon Street, Mr. Delli Priscoli advised the Town that as it did not have an easement under the railroad tracks or the Premises and the G&U needed to have the drainage placed underground and the area cleaned up in order for the G&U to properly facilitate the railroad operations. As the Town did not have the resources to address this in a timely fashion the Town, the Commission and Mr. Delli Priscoli agreed that the G&U would complete the work required to accomplish same. *Id.* ¶19.

20. At all times during the 2018 Revitalization Project process, the G&U worked cooperatively with the Town and the Commission keeping them both apprised of the situation and sharing their ideas and plans, including discussing and providing conceptual plans for the work to be completed, the use of best management practices, the implementation of appropriate precautionary measures and sharing engineering and environmental monitoring and/or testing information. *Id.* ¶20.

21. There was never any cease and desist or other regulatory action taken by the Commission or any Town department concerning the plan or work. In fact, they all acknowledged their approval of the plan and work once completed, as it eliminated an eyesore and an environmental problem and created better water quality and water flow of the Town's

drainage from its source at the northeast side of the Premises to its discharge point at the Mill River. *Id.* ¶21.

22. Specifically, the Commission and the Town agreed with the approach the G&U was taking to complete the proposed work as the G&U was attentive to the Town's and the Commission's thoughts and requests, constructing and implementing a system that met or exceeded the water quality standards and the requirements the Commission would have required if the G&U had to file a Notice of Intent. *Id.* ¶22.

23. The G&U had a Site Plan prepared by Arthur F. Borden & Associates depicting the proposed and constructed drainage system (the "Borden Plan") and provided it to the Town and Commission. A true and correct copy of the Borden Plan is attached hereto as Exhibit A. *Id.* ¶23.

24. At all times during the revitalization process, the G&U worked cooperatively with the Town and the Commission and took suggestions from the discussions with the Commission in order to create a system that was much better than existed previously and that met or exceeded the standards required by the Massachusetts Wetlands Protection Act. *Id.* ¶24.

25. Through this revitalization process the G&U took an area which was a trench full of debris and waste, including but not limited to tires, grocery carts, odd pieces of machinery/metal and general waste and cleaned it up and constructed the drainage system depicted on the Borden Plan. *Id.* ¶25.

26. With the 2008 Revitalization Project complete, on September 30, 2012, after 24 years with no rail commerce to Hopedale, the first locomotive in 24 years was able to travel to the Hopedale Railyard. True and accurate copies of photographs accessed from Google Earth (https://www.google.com/earth/) are attached hereto as Exhibit B, showing the Premises in (i)

April 2008, before the G&U cleared a building and foliage from the Premises; (ii) April 2009, prior to commencing the work; (iii) June 2010, after the work in question was completed; and (iv) August 2013 after the railroad operations had commenced. *Id.* ¶26.

27. Since that time, the operations at the Hopedale Railyard have been under the exclusive control and direction of the G&U and have continued to grow, with the number of railcars coming in and out of the facility increasing dramatically year over year, with over five (500) hundred railcars coming through the facility last year and supporting interstate commerce. Indeed, a majority of the sheetrock industry locally is supplied by CertainTeed and Georgia Pacific by way of the G&U at Hopedale Railyard. Similarly, U.S. Ecology sends materials including dirty dirt for out of state processing. Additionally, construction materials also travel by way of the G&U to the Hopedale Railyard, including shingles, specialty lumber, tile backer board, fencing, and other construction materials. *Id.* ¶27.

II. STANDARD OF REVIEW

A party is entitled to summary decision pursuant to 310 CMR 1.01(11)(f) "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with [any] affidavits,...show that there is no genuine issue as to any material fact and that the moving party is entitled to a final decision in its favor as a matter of law." 310 CMR 1.01(11)(f). "A motion for summary decision is in essence a motion for summary judgment in an administrative appeal[.]" Recommended Final Decision, *In the Matter of Lowe's Home Centers, Inc.*, (No. WET-2009-013, slip op. at *3 (Mass. OADR June 30, 2009) (citing *Mass. Outdoor Advert. Council v. Outdoor Advert. Bd.*, 9 Mass. App. Ct. 775, 785-86 (1980)).

III. ARGUMENT

There is no genuine issue of material fact that the G&U's 2008 Revitalization Project of the Hopedale Railyard was not subject to the MWPA and Wetlands Regulations because they are preempted by the Interstate Commerce Commission Termination Act. Therefore, a summary decision should enter in Petitioner's favor that the Department's enforcement of the MWPA and the Wetlands Regulations with respect to the Hopedale Railyard is preempted by 49 U.S.C. § 10501.

A. The Constitution Provides Congress With the Power to Preempt State Law

It is a "fundamental principle of the Constitution" that the Supremacy Clause gives Congress "the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *see also* U.S. Const. art. VI, cl. 2; *Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 220 (2d Cir. 2008) ("The Supremacy Clause . . . 'invalidates state laws that interfere with, or are contrary to, federal law.'" (quoting *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985))). "When considering a claim of federal preemption, a court's principal focus is discerning whether Congress intended to displace an area of state law." *Goodspeed Airport, LLC v. E. Haddam Inland Wetlands & Watercourses Comm'n*, 681 F. Supp. 2d 182, 199 (D. Conn. 2010), *aff'd*, 634 F.3d 206 (2d Cir. 2011).

B. The MWPA and Wetlands Regulations Are Preempted by the Interstate Commerce Commission Termination Act and, Therefore, Petitioner Had No Duty to Comply with Them before Performing Its 2008 Revitalization Project.

"The Interstate Commerce Act has long been recognized as 'among the most pervasive and comprehensive of federal regulatory schemes.'" *New Eng. Transrail, LLC, d/b/a Wilmington & Woburn Terminal Ry.--Constr., Acquisition & Operation Exemption*, No. FD 34797, 2007 WL 1989841, at *5 (S.T.B. June 29, 2007) (quoting *Chi. & N.W. Transp. Co. v.*

Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981)). In 49 U.S.C. § 10501(a), Congress gave the Surface Transportation Board jurisdiction over "transportation by rail carrier." 49 U.S.C. § 10501(a); *Providence & Worcester R.R. Co.--Petition for Declaratory Order*, No. FD 35393, 2011 WL 2076463, at *3 (S.T.B. May 23, 2011). In 1995, through the Interstate Commerce Commission Termination Act (the "ICCTA"), Congress modified 49 U.S.C. § 10501(b), thereby broadening the Federal preemption, "expressly mak[ing] the Board's jurisdiction 'exclusive' for all transportation by rail carriers, including the facilities and structures that are an integral part of that transportation." *Norfolk S. Ry. Co., Pan Am Railways, Inc., et al.--Joint Control & Operating/Pooling Agreements*, No. FD 35147, 2009 WL 289607, at *3 (S.T.B. Jan. 30, 2009); 49 U.S.C. § 10501(b)(2) ("[T]he remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.") "The statutory language [of the ICCTA] indicates an express intent on the part of Congress to preempt the entire field of railroad regulation, including activities related to but not directly involving railroad transportation. *Grafton & Upton R.R. Co. v. Town of Milford*, 337 F. Supp. 2d 233, 238 (D. Mass 2004); *City of Auburn v. U.S. Gov't*, 154 F.3d 1025, 1031 (9th Cir. 1998) ("[C]ongressional intent is clear, and the preemption of rail activity is a valid exercise of congressional power under the Commerce Clause.").

1. The STB Had Exclusive Jurisdiction Over the Hopedale Railyard Because It Involves Transportation by a Rail Carrier.

As discussed, *supra*, Section 10501(b) gives the STB jurisdiction over "transportation by rail carriers." "Determining whether the ICCTA preempts a state or local law is a two-step inquiry. First, the law must seek to regulate 'transportation,' " and "second, that transportation must be conducted 'by a rail carrier.' " *Padgett v. Surface Transp. Bd.*, 804 F.3d 103, 107–08 (1st Cir. 2015) (citations omitted). The term "rail carrier" is defined as "a person providing

common carrier railroad transportation for compensation . . ." 49 U.S.C. § 10102(5), and includes its facilities and structures. *Grafton & Upton R.R. Co. Petition for Declaratory Order*, No. FD 35752, 2014 WL 4658736, at *3–4 (S.T.B. Sept. 17, 2014); *Norfolk S. Ry. Co.*, 2009 WL 289607, at *3. The term "transportation" is defined broadly to include property, facilities, and equipment related to the movement of passengers or property by rail, as well as "services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property." 49 U.S.C. § 10102(9)(B); *New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Ry.--Constr., Acquisition & Operation Exemption--in Wilmington & Woburn, Ma*, Fed. Carr. Cas. (CCH) ¶ 37241 (STB June 29, 2007). ("Transportation" is expressly defined to include receipt, delivery, transfer in transit, storage, and handling of property and, therefore, "'transportation' is not limited to the movement of a commodity while it is in a rail car, but includes such integrally related activities as loading and unloading materials from rail cars and temporary storage," as well as transloading.)

Whether a specific activity qualifies as transportation by a rail carrier is a fact-specific inquiry and is analyzed on a case-by-case basis. *Grafton & Upton R.R. Co. Petition*, 2014 WL 4658736, at *3–4. The STB considers any activity that is integrally related to the railroad's ability to provide rail transportation services as under its exclusive jurisdiction. *Hi Tech Trans, LLC-Petition for Declaratory Order-Hudson Cty., Nj*, No. 34192, 2002 WL 31595417, at *2 (S.T.B. Nov. 19, 2002); *New Eng. Transrail, LLC, d/b/a Wilmington & Woburn Terminal Ry.--Constr., Acquisition & Operation Exemption*, No. FD 34797, 2007 WL 1989841, at *9 (S.T.B. June 29, 2007). "When the loading, unloading, or transloading of materials is performed by a rail carrier, on property owned by the rail carrier, through services rendered as a common carrier

to the public, such activity has been found to fall under the purview of the ICCTA." *Girard v. Youngstown Belt Ry. Co.*, 979 N.E.2d 1273, 1284–85 (Ohio 2012).[2]

There is no question here that the 2008 Revitalization Project fell squarely under the exclusive jurisdiction of the STB. Since 2008, the G&U has been the sole tenant of the Hopedale Railyard and has had complete control of the site as the sole tenant. Gerrity Aff. ¶8; Delli Priscoli Aff. ¶13. The 2008 Revitalization Project consisted of the G&U constructing an underground drainage trench to move existing drainage below ground. Gerrity Aff. ¶12; Delli Priscoli Aff. ¶18. The existing drainage trench carried the Housing Authority's and Town's drainage across the Railyard. *Id.* While in the process of revitalizing the Hopedale Railyard and making it usable, G&U learned that it would need to move the drainage ditch underground and clean up the area to be able to recommence railroad operations at that site. *Id.* ¶19. The improvements, once completed, created better water quality and water flow from its source at the northeast side of the Hopedale Railyard to its discharge point at the Mill River. *Id.* ¶21.

The G&U, which performed the project in question, transports goods in interstate commerce, which arrive at, and are sent from, the Hopedale Railyard by rail, and shipping and receiving is handled onsite to facilitate interstate commerce. Specifically, a majority of the sheetrock industry locally is supplied by CertainTeed and Georgia Pacific by way of the G&U at Hopedale Railyard. *Id.* ¶27. Similarly, U.S. Ecology sends materials including dirty dirt for out of state processing. *Id.* Additionally, construction materials also travel by way of the G&U to the Hopedale Railyard, including shingles, specialty lumber, tile backer board, fencing, and other construction materials. *Id.* The 2008 Revitalization Project was designed to improve the G&U's

[2] The law is clear that activity occurring on property leased by a rail carrier is subject to STB jurisdiction under ICCTA. *Pinelawn Cemetery petition for Declaratory Order*, No. FD 35468, 2015 WL 1813674, at *9 (S.T.B. Apr. 20, 2015).

tracks to the facility as well as the facilities needed to support shipping and receiving in furtherance of interstate commerce. Therefore, pursuant to the broad definition set forth in the statute, the 2018 Revitalization Project satisfied the transportation requirement and, moreover, it is integrally related to the G.U.'s ability to provide transportation services by railway. As a result, Petitioner has demonstrated that it is engaging in activity that qualifies as transportation by rail carrier and, therefore, there is no genuine question of material fact that the 2008 Revitalization Project and Hopedale Railyard are under the jurisdiction of the STB pursuant to the ICCTA. 49 U.S.C. § 10501(b).

2. The MWPA and Wetlands Regulations Are Preempted by the ICCTA Because They Unreasonably Interfere with Railroad Operations.

i. MWPA and Wetlands Regulations

The MWPA is a Massachusetts procedural act which sets forth the steps one must take before conducting dredging or landfill activities in certain wetland areas. Mass. Gen. Laws c. 131, § 40; *DiCicco v. Dep't of Envtl. Prot.*, 64 Mass. App. Ct. 423 (2005). Specifically, the MWPA provides that, before filling, dredging or altering any land bordering water, one must file notice of its intentions, including the plan, proposed activity, and potential effects on the environment. Mass. Gen. Laws c. 131, § 40. The purpose of the act is to preserve and protect coastal and other wetlands bordering rivers and other bodies of water. *Garrity v. Conservation Comm'n of Hingham*, 462 Mass. 779, 785 (2012).

The Massachusetts Wetlands Regulations set forth the process for conservation commissions and the Department of Environmental Protection to comply with their responsibilities pursuant to the MWPA. *See* 310 CMR 10.01.

In 2008, the G&U learned that it needed to have drainage on the Hopedale Railway placed underground and the area cleaned up to properly facilitate railroad operations. Delli

Priscoli Aff. ¶12. Following Applicant's Request for Determination of Applicability, on April 23, 2019, the Department of Environmental Protection issued a Positive Superseding Determination of Applicability, in which it found that the area in question at the Hopedale Railyard was subject to protection under the MWPA and, therefore, the Project would have required a Notice of Intent. However, as set forth below, Petitioner has shown that the MWPA and Wetlands Regulations are preempted by Federal law governing interstate commerce as a matter of law.

ii. The MWPA and Wetlands Regulations Interfere with Interstate Commerce

"The purpose of the Federal preemption is to prevent a patchwork of local and state regulation from unreasonably interfering with interstate commerce." *New England Transrail, LLC,* 2007 WL 1989841, at *5; *Providence & Worcester R.R. Co*, 2011 WL 2076463, at *3. Therefore, in cases where 49 U.S.C. § 10501(a) confers jurisdiction on the STB, two broad categories of state laws are categorically preempted pursuant to § 10501(b):

> (1) permitting or preclearance requirements (including environmental, zoning and other land use requirements) that by their nature could be used to deny a railroad the right to conduct rail operations or proceed with transportation activities the Board has authorized; and
>
> (2) attempts to address rail transportation matters that are regulated by the Board.

Providence & Worcester R.R. Co, 2011 WL 2076463, at *3. In addition, a state law or requirement may be preempted if it "directly targets or discriminates against rail transportation" or "would unreasonably burden or interfere with transportation by the rail carrier." *Id.* Railroads may be required to comply with health and safety regulations such as fire or electrical codes. *See New Eng. Transrail, LLC,* 2007 WL 1989841, at *5.

State environmental laws fall squarely into the types of state and local regulations preempted by the ICCTA. Indeed, case law is clear that that state and local regulations cannot serve as a veto or to "unreasonably interfere with railroad operations." –*In re Bos. & Me. Corp. & Town of Ayer,* No. FD 33971, 2001 WL 458685, at *5 (S.T.B. Apr. 30, 2001). The STB explained that:

> [T]he case law interpreting [§ 10501(b)] consistently has found state and local permitting or preclearance requirements (including zoning ordinances and environmental and land use permitting requirements) to be wholly preempted where the railroad facility is an integral part of the railroad's operations. This is because permitting or preclearance requirements could give a local body the ability to deny the carrier the right to construct, develop, and maintain facilities or conduct operations, which would create an irreconcilable conflict with the Board's exclusive jurisdiction over those facilities and operations.

Norfolk S. Ry. Co., 2009 WL 289607, at *3. *See also In re Bos. & Me. Corp.*, 2001 WL 458685, at *5 ("[S]tate and local permitting or preclearance requirements (including environmental requirements) are preempted because by their nature they unduly interfere with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations.").

The Second Circuit analyzed this very issue in the matter of *Green Mountain Railroad Corp. v. Vermont,* 404 F.3d 638 (2d Cir. 2005). In that action, the railroad sought to construct a facility to assist with shipping and receiving goods in connection with the railroad and brought suit against the state, Attorney General, and state national resources agency, seeking a declaration from the Court that the ICCTA preempted the state's environmental land use law which required a preconstruction permit for land development. *Id.* at 640. The Court held that the ICCTA preempted the environmental law, and, therefore, the railroad was not required to comply with the state permitting requirement. *Id.* Recognizing that similar regulations consistently are struck down on the same grounds, the Court explained that the environmental

regulation was preempted for the following two reasons: "(i) it 'unduly interfere[s] with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations,' *Town of Ayer*, STB Finance Docket No. 33971, 2001 WL 458685, at *5; and (ii) it can be time-consuming, allowing a local body to delay construction of railroad facilities almost indefinitely. *Green Mountain R.R. Corp.*, 2003 U.S. Dist. LEXIS 23774, at *13." *Green Mountain R.R. Corp.*, 404 F.3d at 642-43. The Court further reasoned that the state's argument that the regulation was environmental, not economic, and, therefore cannot be preempted, was not a useful distinction. *Id.* The Court explained that, even where the goals of the regulation were environmental, the process set forth in the regulation interfered with its "ability to construct facilities and conduct economic activities." *Id.* at 644-45 (internal quotation marks and citation omitted); *see also City of Auburn*, 154 F.3d at 1031("[I]f local authorities have the ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.").

Exactly like the state regulation in *Green Mountain*, here, the MWPA and Wetlands Regulations are state laws with an environmental purpose addressing pre-construction approval before work is performed. *See* MWPA; *see* Wetlands Regulations. The MWPA and Wetlands Regulations require that, before filling, dredging or altering any land bordering water, one must file notice of its intentions, including the plan, proposed activity, and potential effects on the environment. *See* Mass. Gen. Laws c. 131, § 40. Performing these steps would have resulted in the potential prohibition on the G&U moving the drainage underground, which would have resulted in the G&U's potentially not being able to utilize the Hopedale Railyard for its intended purpose of supporting interstate commerce, as well as potential additional costs, and delay.

Especially , since the Town was not in a position to facilitate the work required. These are the exact consequences the ICCTA is designed to prevent. As the Court held in *Green Mountain*, even though the regulation concerned environmental law, the permitting process would necessarily interfere with the G&U's ability to revitalize the rail system to the Hopedale Railyard, render the tracks safe and construct the facilities needed at the Hopedale Railyard for shipping and receiving goods in furtherance of interstate commerce. Therefore, the ICCTA preempts the MWPA and Wetlands Regulations and summary decision should enter for Petitioner as a matter of law.

1. The G&U Worked Closely With the Community on the 2008 Project.

Furthermore, even if G&U were not exempt from the MWPA and Wetlands Regulations as set forth above, prior to and during the 2008 Revitalization Project, G&U cooperated diligently with the Town and Commission to address any concerns they or the community may have had. Indeed, the STB previously has suggested that, as a practical matter, railroads and communities may need to cooperate in order to find a solution that does not interfere with interstate commerce and addresses community concerns. *See –In re Bos. & Me. Corp.*, 2001 WL 458685, at *7. Proposed solutions in that regard have included the following:

> (1) share their plans with the community, when they are undertaking an activity for which another entity would require a permit; (2) use state or local best management practices when they construct railroad facilities; (3) implement appropriate precautionary measures at the railroad facility, so long as the measures are fairly applied; (4) provide representatives to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns; and (5) submit environmental monitoring or testing information to local government entities for an appropriate period of time after operations begin.

Id. In the present case, the G&U exceeded any reasonable expectations in its cooperation with the Town. The G&U, through Mr. Delli Priscoli, initially approached the Town and Commission

to discuss the drainage trench carrying the Housing Authority's and other Town drainage under the G&U's rail tracks/bed across the Hopedale Railyard. Delli Priscoli Aff. ¶18. The G&U advised it needed to have the drainage placed underground and the area cleaned up in order to properly facilitate the railroad operations. *Id.* The Town did not have the resources to address the issue in a timely fashion and, therefore, the Town, Commission and Mr. Delli Priscoli agreed that the G&U would complete the work required to accomplish same. *Id.* ¶19. At all times during this process, the G&U worked cooperatively with the Town and the Commission keeping the Town and Commission apprised of the situation and sharing their plans, including discussing and providing conceptual plans for the work to be completed, the use of best management practices, the implementation of appropriate precautionary measures and sharing environmental monitoring and/or testing information. *Id.* ¶20. There was never any cease and desist or other regulatory action taken by the Commission or any Town department regarding the 2018 Revitalization Project, and the Town and Commission acknowledged they approved the work in that it eliminated an eyesore and an environmental problem and created better water quality and water drainage. *Id.* ¶21. Indeed, the G&U was attentive to creating a system that met or exceeded the water quality standards and requirements the Commission would have required if the G&U had to filed a Notice of intent. *Id.* ¶22.

Even though the G&U had no obligation to submit any documents pursuant to the MWPA and Wetlands Regulations, it cooperated in good faith with the Town and Commission for the purposes of addressing any potential community concerns. Not only did the G&U keep both the Town and Commission fully informed, but they approved the work. Therefore, the G&U exceeded its obligations and took many steps to mitigate any potential disruption to the community, as the STB frequently has encouraged parties.

C. **The MWPA and Massachusetts Wetlands Regulations Do Not Concern Railroad Safety or Security and, Therefore, 49 U.S.C. § 20106 Is Not Relevant.**

In the Pre-Screening Conference Report and Order, issued by the Court on June 11, 2019, the Office of Appeals and Dispute Resolution identified the issue for resolution in appeal as preemption pursuant to 49 U.S.C. § 10501 and 49 U.S.C. § 20106. *See* Pre-Screening Conference Report and Order, p. 3. Preemption pursuant to 49 U.S.C. § 20106 pertains to the preemption of state laws regarding railroad safety and security. 49 U.S.C. § 20106 ("Safety Preemption Act"). The Safety Preemption Act is not relevant here because the issue before the Court is whether the MWPA and Wetlands Regulations are preempted, neither of which addresses safety or security of railroad operations, but instead is designed to protect Massachusetts wetlands. Petitioner expressly reserves the right to submit supplemental briefing on this issue if it is deemed relevant by the Court.

IV. CONCLUSION

WHEREFORE, for all the foregoing reasons, Petitioner requests that the Court enter a summary decision in its favor that, as a matter of law, the Department's enforcement of the Massachusetts Wetlands Protection Act, Mass. Gen. Laws c. 131 § 40, and the Wetlands Regulations, 310 CMR 10.00 *et seq*. with respect to the Hopedale Railyard is preempted by 49 U.S.C. § 10501, and for such other and further relief as the Court deems necessary and proper.

Respectfully submitted,

GERRITY COMPANIES INCORPORATED,

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Dated: July 3, 2019

CERTIFICATE OF SERVICE

I, Melissa Bruynell Manesse, hereby certify that on this 3rd day of July 2019, I caused a copy of the foregoing to be served by first-class mail upon the following counsel of record:

Melissa Bruynell Manesse

Exhibit 17

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

January 17, 2020

In the Matter of
Hopedale Properties, LLC

Docket No. WET-2019-013
Hopedale, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

The Petitioner, Gerrity Companies, Inc. ("Gerrity"), challenges a Superseding Determination of Applicability ("SDA") that the Massachusetts Department of Environmental Protection's Central Regional Office ("MassDEP") issued to the SDA applicant, Hopedale Properties, LLC ("Applicant"). The SDA was issued pursuant to the Wetlands Protection Act, G.L. c. 131 § 40 (or "Wetlands Act" or "Act"), and the Wetlands Regulations, 310 CMR 10.00. The SDA determined that a portion of property owned by Gerrity at 1 Fitzgerald Drive, Hopedale, Massachusetts ("the Property") contains protected Resource Areas under the Wetlands Act and Wetlands Regulations that were altered approximately ten years ago by development work on the Property. The Hopedale Railyard operates on the Property, which abuts the Applicant's property. The development work at issue was purportedly first commenced in about 2008 by Gerrity's tenant, Grafton & Upton Railroad Company ("G&U"), with Gerrity's authorization.

The issue before me is the extent to which, if at all, MassDEP's regulatory actions at issue in this appeal are preempted by the United States Congress' regulation of rail carriers under 49 U.S.C. § 10501. Generally, Gerrity asserts that preemption applies, precluding MassDEP from taking any action, including issuance of the SDA. MassDEP and the Applicant contend, broadly speaking, that preemption does not apply under the circumstances of this case.

Before this appeal was transferred to me, the parties held a Pre-Hearing Conference with the Chief Presiding Officer, Salvatore Giorlandino. There, the parties agreed that the most efficient way to resolve the appeal was by way of filing cross motions for summary decision pursuant to 310 CMR 1.01(11)(f). Pre-Screening Conference Report and Order, p. 3.[1]

After reviewing the entire administrative record, I conclude that entry of summary decision is warranted and preemption does not apply to the present circumstances. Although there are numerous disputed issues of material fact concerning precisely how, when, and who performed the work at issue and the reason why it was performed, the essential facts underlying the only regulatory action at issue—MassDEP's issuance of the SDA—are not genuinely disputed. It is not genuinely disputed that when the work occurred at the Property in and after 2008 there were wetland Resource Areas located on the Property that were altered by the work. The undisputed facts demonstrate that there has been no MassDEP regulatory action that is being applied to unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce. Given this undisputed absence of such restriction or burden, preemption does not apply to MassDEP's issuance of the SDA. As a consequence, I recommend that MassDEP's Commissioner issue a Final Decision: granting summary decision in favor of MassDEP and the Applicant and against Gerrity; and affirming the SDA.

[1]Although the Pre-Screening Conference Report and Order also identifies whether 49 U.S.C. § 20106 is preemptive, the parties have since agreed that that provision is not at issue in this appeal.

STANDARD OF REVIEW

The Adjudicatory Rules, 310 CMR 1.01(11)(f), provide for the issuance of summary decision where the pleadings together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law. See e.g. Matter of Papp, Docket No. DEP-05-066, Recommended Final Decision, (November 8, 2005), adopted by Final Decision (December 27, 2005); Matter of Lowes Home Centers Inc., Docket No. WET-09-013, Recommended Final Decision (January 23, 2009), adopted by Final Decision (February 18, 2009). A motion for summary decision in an administrative appeal is similar to a motion for summary judgment in a civil lawsuit. See Matter of Lowe's Home Centers, Inc., supra, (citing Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, 9 Mass. App. Ct. 775, 785-86 (1980)).

WETLAND RESOURCE AREAS

The purpose of the Wetlands Act and the Wetlands Regulations is to protect wetlands and to regulate activities affecting wetlands areas in a manner that promotes the following:

(1) protection of public and private water supply;

(2) protection of ground water supply;

(3) flood control;

(4) storm damage prevention;

(5) prevention of pollution;

(6) protection of land containing shellfish;

(7) protection of fisheries; and

(8) protection of wildlife habitat.

G.L. c. 131, § 40; 310 CMR 10.01(2).

The SDA in this appeal confirmed there are a number of wetlands Resource Areas and Buffer Zone on the Property, including Bordering Vegetated Wetlands ("BVW"), Intermittent Stream and Bank, Perennial Stream or River, Riverfront Area, and Bordering Land Subject to Flooding ("BLSF"). See 310 CMR 10.02 (defining jurisdiction), 10.04 (defining stream and river), 10.57 (BLSF definition and performance standard), 10.58 (definition of stream, river, and Riverfront Area).

River, Riverfront Area, and Stream. Under the Act and the Regulations, a river is defined as a natural flowing body of water that empties to any ocean, lake, or other river and which flows throughout the year. G.L. c. 131 § 40. 310 CMR 10.58(2)(a)1. Rivers include perennial streams because surface water flows within them throughout the year. Id.; 310 CMR 10.04 (definition of stream).

All perennial streams, or rivers, have a regulated Riverfront Area. Riverfront Areas generally receive special protection under the Act and the Regulations because of the environmental benefits they provide, including: protection of the water supply (including groundwater), flood control, storm damage prevention, protection of wildlife habitat (including fisheries and habitat within the Riverfront Area), and maintenance of water temperatures. They are critical to preventing water pollution by filtering contaminants before they reach the River and groundwater. See generally 310 CMR 10.58(1) (discussing in detail environmental benefits of the Riverfront Area). The Act defines the Riverfront Area as: "that area of land situated between a river's mean annual high-water line and a parallel line located two hundred feet away, measured outward horizontally from the river's mean annual high-water line." G.L. c. 131 § 40.

Intermittent Streams are different from rivers (or perennial streams), because they do not flow throughout the entire year. Nevertheless, Intermittent Streams, like Rivers, have the

Resource Areas of Land Under Water and Bank (and its associated Buffer Zone), which receive certain protections under the Act and the Regulations. See 310 CMR 10.54 and 10.56.

BLSF. BLSF is "an area with low, flat topography adjacent to and inundated by flood waters rising from creeks, rivers, streams, ponds or lakes. It extends from the banks of these waterways and water bodies . . . ." 310 CMR 10.57(2)(a)1. BLSF "provides a temporary storage area for flood water which has overtopped the bank of the main channel of a creek, river or stream or the basin of a pond or lake. During periods of peak run-off, flood waters are both retained (i.e., slowly released through evaporation and percolation) and detained (slowly released through surface discharge) by Bordering Land Subject to Flooding. Over time, incremental filling of these areas causes increases in the extent and level of flooding by eliminating flood storage volume or by restricting flows, thereby causing increases in damage to public and private properties." 310 CMR 10.57(1)(a). "Certain portions of Bordering Land Subject to Flooding are also likely to be significant to the protection of wildlife habitat. These include all areas on the ten year floodplain or within 100 feet of the bank or bordering vegetated wetland (whichever is further from the water body or waterway, so long as such area is contained within the 100 year floodplain), and all vernal pool habitat on the 100 year floodplain, except for those portions of which have been so extensively altered by human activity that their important wildlife habitat functions have been effectively eliminated (such "altered" areas include paved and graveled areas, golf courses, cemeteries, playgrounds, landfills, fairgrounds, quarries, gravel pits, buildings, lawns, gardens, roadways (including median strips, areas enclosed within highway interchanges, shoulders, and embankments), railroad tracks (including ballast and embankments), and similar areas lawfully existing on November 1, 1987 and maintained as such

since that time)." 310 CMR 10.57(1)(a). The BLSF boundary is established according to 310 CMR 10.57(2)(a)3.a, b, and c,

BVW. The Inland Wetlands Regulations group together the types of freshwater wetlands as "Bordering Vegetated Wetlands," or BVW, as follows: "Bordering vegetated wetlands are freshwater wetlands which border on creeks, rivers, streams, ponds and lakes. The types of freshwater wetlands are wet meadows, marshes, swamps and bogs. Bordering vegetated wetlands are areas where the soils are saturated and/or inundated such that they support a predominance of wetland indicator plants. The ground and surface water regime and the vegetational community which occur in each type of freshwater wetland are specified in M.G.L. c. 131, § 40." 310 CMR 10.55(2)(a).

"Bordering Vegetated Wetlands are likely to be significant to public or private water supply, to ground water supply, to flood control, to storm damage prevention, to prevention of pollution, to the protection of fisheries and to wildlife habitat." 310 CMR 10.55(1). "The plants and soils of Bordering Vegetated Wetlands remove or detain sediments, nutrients (such as nitrogen and phosphorous) and toxic substances (such as heavy metal compounds) that occur in run off and flood waters." Id. "Prevention of Pollution means the prevention or reduction of contamination of surface or ground water." 310 CMR 10.04 ("Prevention of Pollution"). "Significant means plays a role. A resource area is significant to an interest identified in M.G.L. c. 131, § 40 when it plays a role in the provision or protection, as appropriate, of that interest. . . ." 310 CMR 10.04 ("Significant").

Buffer Zone. The Buffer Zone is that area of land extending 100 feet horizontally outward from the boundary of any Resource Areas specified in 310 CMR 10.02(1)(a). 310 CMR

10.04 (defining Buffer Zone). Here, the Buffer Zone is for the Resource Areas of BVW and Bank. See 310 CMR 10.02 and 10.04 (defining Resource Areas).

For work in the Buffer Zone there are a number of regulatory provisions and decisions dictating that the work is subject to less scrutiny than work which takes place in the Resource Areas themselves. First, Buffer Zone work is not per se regulated under the Act or the Regulations. See 310 CMR 10.02(2)(b). Instead, only that work which, in the judgment of the issuing authority, will alter a Resource Area is subject to regulation under M.G.L. c. 131, 40 and requires the filing of a Notice of Intent. Id. Thus, the Buffer Zone may generally be altered if it will not alter a Resource Area, as determined by the issuing authority. In contrast, any alteration of a Resource Area is generally subject to jurisdiction under the Act and Regulations. See 310 CMR 10.02(2)(a).

BACKGROUND

G&U was founded in 1874 as a narrow-gauge railroad. It has evolved and grown since that time as a railroad enterprise in various modes of operation and with different owners. In approximately 2008, Gerrity, through its predecessor in interest, MT Waldo Operations, Inc., purportedly entered a Lease Agreement with G&U with respect to the Hopedale Railyard, allegedly establishing G&U as the sole tenant. Since then, G&U has operated as a railroad at the Property, with all activities allegedly being under the control and direction of G&U.

In 2008, G&U purportedly first commenced work at the Property with Gerrity's authorization. The project included: (1) culverting a 300-foot long Intermittent Stream underground, (2) filling and grading approximately 20,000 square feet of BLSF, and (3) converting more than two acres of vegetated Riverfront Area associated with the Mill River to impervious paved surfaces ("the Project"). See 310 CMR 10.02 (defining jurisdiction), 10.04

(defining stream and river), 10.57 (BLSF definition and performance standard), 10.58 (definition of stream, river, and Riverfront Area).

G&U's asserted objectives for the Project were: addressing twenty years of significant deterioration and neglect; removing twenty years of vegetative overgrowth; making the railyard safe; and updating and expanding operations. Gerrity and G&U also claim that the Project "eliminated an eyesore and environmental problem and created better water quality and water flow of the Town's drainage [in the Intermittent Stream] from its source at the northeast side of the [Property] to its discharge point at the Mill River." Gerrity Motion for Summary Decision, p. 6. They claim that the Project allegedly exceeded standards required by the Wetlands Act. G&U and Gerrity add that at all times they worked closely with the Town of Hopedale and the Town of Hopedale Conservation Commission ("Commission") for G&U to perform the work to the Town's and Commission's satisfaction.

The Applicant's RDA. The Wetlands Regulations provide a simple procedure for someone to obtain a determination of applicability. Pursuant to 310 CMR 10.05(3)(a), "[a]ny person who desires a determination as to whether [the Wetlands Act] applies to land, or to work that may affect an Area Subject to Protection under M.G.L. c. 131, § 40, may submit to the conservation commission by certified mail or hand delivery a Request for a Determination of Applicability ["RDA"], Form 1." In response, and pursuant to 310 CMR 10.05(3)(a), the conservation commission is required to: "find that [the Wetlands Act] applies to the land, or a portion thereof, if it is an Area Subject to Protection under [the Wetlands Act] as defined in 310 CMR 10.02(1). The conservation commission shall find that [the Wetlands Act] applies to the work, or portion thereof, if it is an Activity Subject to Regulation under [the Wetlands Act] as defined in 310 CMR 10.02(2). The conservation commission shall identify the scope of

alternatives to be evaluated, if requested, for work within riverfront areas under 310 CMR 10.58(4)(c)2."

The "scope of a request is particularly important because [RDAs] are meant to be simple, useful devices that allow a quick determination to be made as to whether the [Act] applies to a given site or proposed work. . . . [T]he scope of a determination is limited by the scope of the request. The requestor is entitled only to an answer to the question asked." Matter of Marjorie Emery, Docket No. 2007-009, Recommended Final Decision (July 26, 2007), adopted by Final Decision (July 27, 2007).

Here, the Property is approximately 15.7 acres. The Applicant owns abutting property located at 6 Fitzgerald Drive, Parcel 11-174-1, including purported easements to the area of the Mill River abutting the Property and has deeded water rights to the Mill River.

On December 5, 2018, the Applicant filed an RDA with the Commission requesting a determination regarding: (1) whether a specified 4.5 acre area on the Property where the work occurred ("the Locus") is subject to jurisdiction under the Wetlands Protection Act and Wetlands Regulations; and (2) whether the work purportedly performed by G&U at the Locus in about 2008 and depicted in a series of photographs over a period of time is subject to the Wetlands Act and Regulations. The work was described in the RDA as "clearing of vegetation and filling of wetland resource areas to install an impervious industrial yard area adjacent to and within flood plain of the Mill River." RDA, p. 2. The RDA asserted that the work was within the following resource areas: BVW, Bank, LUW with intermittent stream, BLSF, Riverfront Area, and Buffer Zone to the preceding areas.

The Locus borders a residential development to the east. The Locus historically contained an intermittent stream that drained westerly across the Locus from a marsh area east of

the Property to the stream's outlet at the Mill River. Because the Mill River is a perennial stream, it contains a Riverfront Area, which includes the area of land two hundred feet from the river's banks. See 310 CMR 10.58.

The RDA presented evidence that between 2008 and the present approximately 4.5 acres of undeveloped and vegetated land (the Locus) was converted to an impervious commercial yard, which included the following alterations: filling of an open 300 foot long vegetated Intermittent Stream, Bank, and LUW with a culvert pipe; filling or regrading of approximately 20,000 square feet of BLSF; converting over 2.3 acres of previously vegetated Riverfront Area to impervious paved commercial use; and converting .9 acres of previously vegetated Buffer Zone to BVW to impervious commercial use. RDA, Ex. B. The RDA also noted that "commercial use [of the Locus] continues with active operations of material storage and vehicle parking with ongoing snow management that is pushing soil material into the Buffer Zone along the Mill River." RDA, Ex. B. The RDA presented additional evidence that potentially contaminated soils, which include PCBs and chlorinated solvents (tetrachloroethylene or PERC), may have been moved into wetlands Resource Areas.[2] It appears from the administrative record that MassDEP is regulating contamination from chlorinated solvents under the Massachusetts Contingency Plan, 310 CMR 40.000, but a large plume allegedly remains adjacent to the Mill River. Id.

On February 19, 2019, the Commission issued a negative determination of applicability, finding, without explanation, the Locus and work did not encompass areas subject to protection

[2] The Applicant contends that, among other things, G&U dumped excavated earth into local waters and discharged harmful substances during a railroad construction and upgrade project when it filled and altered Resource Areas, including Bank, Stream, and Riverfront Area. The Applicant also asserts that "[w]ith the extensive movement of materials during reconstruction of the Site there is reason to question whether the soils placed as fill within the wetland resource areas may have included contaminated soil moved within the Site." Applicant's Opposition to Petitioner's Motion for Summary Decision and Cross Motion for Summary Decision, p. 11, n. 3.

under the Wetlands Act and Regulations. The Applicant appealed that determination to MassDEP's Central Regional Office, requesting the SDA.

MassDEP issued a positive SDA, finding the Project took place within, and altered, several jurisdictional wetland Resource Areas. Specifically, the work included cutting trees; clearing vegetation; culverting approximately 300 feet of intermittent stream channel; and filling, grading, and paving in wetland Resource Areas. The work altered the Bank to the Intermittent Stream and the Mill River, BLSF, and Riverfront Area associated with the Mill River; and occurred in Buffer Zones to Bank and BVW. SDA, cover letter, p. 2. MassDEP therefore found that the areas described on the plans identified in the RDA are areas subject to protection under the Wetlands Act and Regulations and the work described on the referenced plans and documents is within an area subject to protection under the Wetlands Act and will remove, fill, dredge, or alter that area. SDA, p. 2.

Gerrity appealed the SDA here, to the Office of Appeals and Dispute Resolution.

DISCUSSION

I. MassDEP's Issuance Of The SDA Is Not Preempted

A. The Parties Assert Varying Preemption Arguments

Gerrity argues that MassDEP's "enforcement" of the Wetlands Regulations and the Wetlands Act via the SDA is preempted as a matter of law by 49 U.S.C. § 10501. Gerrity Motion for Summary Decision, p. 1. It argues that preemption exists because: (1) there is "no genuine issue of material fact that the Property is used for transportation by rail carrier and, therefore, it is under the exclusive jurisdiction of the Surface Transportation Board ("STB")" and (2) the Regulations and the Act interfere with a railroad's ability to "construct facilities and conduct activities." Id.

Gerrity adds that the Wetlands Act and Wetlands Regulations are preempted because, Gerrity postulates, that if it had attempted to satisfy the requirement to file a Notice of Intent prior to performing any work, that may have resulted in the "potential" prohibition on G&U moving drainage underground, which could have resulted in G&U's "potentially" not being able to utilize the railyard for "its intended purpose of supporting interstate commerce, as well as potential costs, and delay." Gerrity Motion for Summary Decision, p. 15. Gerrity contends that the Project "fell squarely under the exclusive jurisdiction of the STB" because the project "consisted of G&U [the sole tenant of the railyard] constructing an underground drainage trench to move existing drainage below ground . . . to recommence railroad operations at the site." Gerrity Motion for Summary Decision, p. 11. Gerrity therefore concludes that the Wetlands Act and Wetlands Regulations are preempted "as a matter of law." Garrity Motion for Summary Decision, p. 16.

The Applicant argues that the SDA reflects a reasonable and proper use of inherent police powers and that issuance of the SDA is not preempted. Applicant's Motion for Summary Decision, pp. 1, 12. The Applicant adds that there is no preemption here because there is no "credible" evidence showing that the work was performed by a "rail carrier" and that the work was integrally related to "transportation."[3] Applicant's Motion for Summary Decision, pp. 13-14. It also contends that G&U did not demonstrate that it operated at the Locus from 2008-2011 as a railyard or that the work was related to transportation.

[3]Requirements for preemption include that the law must seek to regulate 'transportation,'" and "second, that transportation must be conducted 'by a rail carrier.'" Padgett v. Surface Transportation Bd., 804 F.3d 103, 109 (1st Cir. 2015) (quoting Tex. Cent. Bus. Lines Corp. v. City of Midlothian, 669 F.3d 525, 530 (5th Cir. 2012); see also, e.g., Norfolk, 608 F.3d at 157-58; Fla. E. Coast Ry. Co. v. City of W. Palm Beach, 266 F.3d 1324, 1331 (11th Cir. 2001). "Whether a particular activity constitutes transportation by rail carrier under section 10501(b) is a case-by-case, fact specific determination" based on a series of factors including "(1) whether the rail carrier holds out transloading as part of its business, (2) the degree of control retained by the [rail] carrier, (3) property rights and maintenance obligations, (4) contractual liability, and (5) financing." Tex. Cent., 669 F.3d at 530-31 (internal quotation marks, citations omitted).

The Applicant also appears to make an alternative argument, suggesting that if I were to find that there is preemption, the "record here does not allow MassDEP or the Presiding Officer to make a preemption finding or determination." Applicant's Motion for Summary Decision, p. 2. It contends that "the issues raised by the Petitioner should be made to and decided by the STB, not MassDEP." Id. The Applicant adds that "railroad preemption determinations are best made by another body and in another forum; namely, the STB." Applicant's Motion for Summary Decision, p. 10. Nevertheless, the Applicant concludes that I should issue a Recommended Final Decision ruling that "the WPA and its regulations are not preempted by 49 U.S.C. 10501 and/or 49 U.S.C. 20106." Id.

MassDEP asserts that summary decision "cannot be entered concerning preemption because the record demonstrates that numerous genuine issues of material fact remain." MassDEP Motion for Summary Decision, p. 4. It contends that there are genuine issues of material fact surrounding the work that G&U purportedly completed, and that affects the preemption analysis. MassDEP Motion for Summary Decision, pp. 4-5. Simultaneously, MassDEP contends that because "the SDA itself does not rely on any of the contested facts, it is not necessary to resolve them in this forum." Id. It contends that preemption is *not at issue* because the SDA does not direct or prohibit G&U to do anything, stating: "Whether the WPA is pre-empted by 49 USC 10501 because it interferes with a railroad's ability to construct facilities and conduct economic activities is not relevant to this SDA, as it does neither. The question is not triggered by this SDA." MassDEP Motion for Summary Decision, p. 12. Despite MassDEP's position that preemption is not at issue, it adds that OADR has jurisdiction to determine the preemption question. MassDEP Motion for Summary Decision, pp. 10-11.

B. Preemption Law

State law is preempted by federal law when: (1) the preemptive intent is "'explicitly stated in [a federal] statute's language or implicitly contained in its structure and purpose'"; (2) state law "actually conflicts with federal law"; or (3) "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977), and Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982)). The "ultimate touch-stone" of preemption analysis is congressional intent: "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it." Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-86, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (1996) (internal quotation marks omitted). The presumption is against preemption and in support of the general rule that traditional police power regulation is not preempted. Padgett v. Surface Transportation Bd., 804 F.3d 103, 109 (1st Cir. 2015).

In 1995, Congress enacted the ICC Termination Act ("ICCTA" or "Termination Act"), which abolished the 108-year-old Interstate Commerce Commission ("ICC") and substantially deregulated the rail and motor carrier industries. Pejepscot Indus. Park v. Me. Cent. R.R. Co., 215 F.3d 195, 197 (1st Cir. 2000). In the ICC's place, the ICCTA established the United States Surface Transportation Board (STB) within the Department of Transportation. See 49 U.S.C. § 701(a); Pejepscot Indus. Park, 215 F.3d at 197.

Under 49 U.S.C. 10501(b)(2), the STB has exclusive jurisdiction over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or

side tracks or facilities, even if the tracks are located, or intended to be located entirely in one State." Section 10501(b)(2) further provides that both "the jurisdiction of the Board over transportation by rail carriers" and "the remedies provided under [49 U.S.C. 10101-11908] are exclusive and preempt the remedies provided under Federal or State law." See City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999); Borough of Riverdale - Petition for Declaratory Order - The New York Susquehanna and Western Railway Corporation, STB Finance Docket No. 33466 (STB served Sept. 10, 1999) (Riverdale I) at 5. "Transportation" is expansively defined to include: "a locomotive, car, vehicle, vessel, warehouse . . . yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail." 49 U.S.C. § 10102(9).

Some federal courts have recognized that under certain circumstances the Termination Act preempts some pre-construction permit requirements imposed by states and localities. See, e.g., City of Auburn, 154 F.3d at 1030-31 (affirming the STB's finding that the Termination Act preempted a local environmental permitting requirement requiring a railway to submit to a permitting process before making repairs and improvements on its track line); Soo Line R.R. Co. v. City of Minneapolis, 38 F. Supp. 2d 1096, 1101 (D. Minn. 1998) ("The Court concludes that the City's demolition permitting process upon which Defendants have relied to prevent [the railroad] from demolishing five buildings . . . that are related to the movement of property by rail is expressly preempted by the [Termination Act]."); CSX Transp., Inc. v. Georgia PSC, 944 F. Supp. 1573, 1585 (N.D. Ga. 1996) (finding state regulation of railroad agency closing preempted by the Termination Act).

The STB has likewise ruled that some "state and local permitting or preclearance requirements (including environmental requirements) are preempted because by their nature they

unduly interfere with interstate commerce." Joint Petition for and Declaratory Order -- Boston and Maine Corp. and Town of Ayer, MA, STB Finance Docket No. 33971, 2001 WL 458685, at *5 (S.T.B. Apr. 30, 2001), aff'd, Boston & Maine Corp. v. Town of Ayer, 191 F. Supp. 2d 257 (D. Mass. 2002) (affirming the Transportation Board's determination that town's pre-construction permit requirement was preempted by the Termination Act); see also Green Mountain R.R. Corp., Petition for Declaratory Order, STB Finance Docket No. 34052, 2002 WL 1058001 (S.T.B. May 24, 2002). As the agency authorized by Congress to administer the Termination Act, the STB is "'uniquely qualified to determine whether state law . . . should be preempted'" by the Termination Act. Georgia PSC, 944 F. Supp. at 1584 (quoting Medtronic, 518 U.S. at 496); Green Mt. R.R. Corp. v. Vermont, 404 F.3d 638, 642 (2nd Cir. 2005).

Despite the breadth of the STB's powers, the courts have been careful not to over-extend preemption. They have stated that whether preemption exists is a factually intensive inquiry. The ultimate test is whether "the statute or regulation is being applied to 'unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce.'" Boston & Me. Corp. v. Town of Ayer, 330 F.3d 12, 17, (1st Cir. 2003); United States v. St. Mary's Ry. West, LLC, 989 F. Supp. 2d 1357, 1363 (S.D. Ga. 2013); Green Mountain R.R. Corp. v. Vermont, No. Civ.1:01-CV-00181JGM, 2003 U.S. Dist. LEXIS 23774, 2003 WL 24051562, at *8 (D. Vt. Dec. 15, 2003) (finding a local preclearance permitting process preempted while noting that compliance under applicable federal laws, such as the CWA, could still be sought), aff'd, 404 F.3d 638 (2d Cir. 2005), cert. denied, 546 U.S. 977, 126 S. Ct. 547, 163 L. Ed. 2d 460 (2005); Flynn v. Burlington N. Santa Fe Corp., 98 F. Supp. 2d 1186, 1189 (E.D. Wash. 2000) (noting that local governments may play a role in implementing the CWA despite the Board's exclusive jurisdiction).

And even if there is preemption of state or local laws, state and local entities are not without remedies. "[W]hen a state or local regulation is preempted, decisions note that federal environmental laws are still available to fill any void." United States v. St. Mary's Ry. West, LLC, 989 F. Supp. 2d 1357, 1364, 2013 U.S. Dist. LEXIS 181015, *17, 2013 WL 6798560. For example, "nothing in section 10501(b) is intended to interfere with the role of *state and local agencies* in implementing Federal environmental statutes, such as the Clean Air Act, the CWA, and the SDWA. See Stampede Pass, 2 I.C.C.2d at 337 & n.14; Riverdale I at 7. Thus, the lack of a specific environmental remedy at the [STB] or under state and local laws (as to construction projects such as this, over which the [STB] lacks licensing power) does not mean that there are no environmental remedies under other Federal laws." Boston & Me. Corp., supra., 2001 Lexis at *19-20.

In applying the fact-bound preemption analysis, the courts have stated: "whether a particular Federal environmental statute, local land use restriction, or other local regulation is being applied so as to not unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce, is a fact-bound question. Accordingly, individual situations need to be reviewed individually to determine the impact of the contemplated action on interstate commerce and whether the statute or regulation is being applied in a discriminatory manner, or being used as a pretext for frustrating or preventing a particular activity, in which case the application of the statute or regulation would be preempted." The focus is primarily on whether there is a "prior restraint" that interferes with interstate commerce and whether the regulation is being "used simply [as a pretext] to permit local communities to hold up or defeat the railroad's right to construct facilities used in railroad operations . . . ." Boston & Me. Corp., supra. Reasonable requirements or conditions for compliance with applicable environmental

laws that do not unreasonably interfere with interstate commerce are not preempted. Boston & Me. Corp., supra. Although conditions or requirements in and of themselves may be reasonable, the manner in which a railroad is subjected to the local or state permit process itself may be preempted. Boston & Me. Corp. v. Town of Ayer, 191 F. Supp. 2d 257, 262 (D. Mass. 2002) (STB found that the planning board and conservation commission's processes were preempted).

In Green Mt. R.R. Corp. v. Vermont, 404 F.3d 638, 642 (2d Cir. 2005) the court stated that while pre-construction permitting programs often unreasonably interfere with rail travel, less burdensome and non-discriminatory regulations would pass muster. It explained further:

> It therefore appears that states and towns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions. Electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption.

404 F.3d at 643.

"The animating idea is that, while states may set health, safety, and environmental ground rules, those rules must be clear enough that the rail carrier can follow them and that the state cannot easily use them as a pretext for interfering with or curtailing rail service." New York Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 254, (3rd Cir. 2007). "But such regulations may not (1) be so open-ended as to all but ensure delay and disagreement, or (2) actually be used unreasonably to delay or interfere with rail carriage. In other words, some regulations, like those at issue in the Green Mountain litigation, give too much discretion to survive a facial challenge because they invite delay. In addition, even a regulation that is definite

on its face may be challenged as-applied if unreasonably enforced or used as a pretext to carry out a policy of delay or interference. New York Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 254-255 (3rd Cir. 2007); United States v. St. Mary's Ry. West, LLC, 989 F. Supp. 2d 1357, 1363 (S.D. Ga. 2013).

For example, "a local law prohibiting the railroad from dumping excavated earth into local waterways would appear to be a reasonable exercise of local police power. Similarly, . . . a state or local government could issue citations or seek damages if harmful substances were discharged during a railroad construction or upgrading project. A railroad that violated a local ordinance involving the dumping of waste could be fined or penalized for dumping by the state or local entity. The railroad also could be required to bear the cost of disposing of the waste from the construction in a way that did not harm the health or wellbeing of the local community." Fletcher Granite Co., LLC – Petitioner for Declaratory Order, Docket No. 34020, 2001 STB LEXIS 590, *10, n. 7 (June 25, 2001) (quoting Auburn and Kent, WA- Petition for Declaratory Order - Burlington N.R.R. - Stampede Pass Line, 2 S.T.B. 330 (1997) (Stampede Pass), aff'd, City of Auburn, supra.

C. MassDEP's Issuance Of The SDA Is Not Preempted

The Applicant and Gerrity view this appeal too broadly. Contrary to Gerrity's argument, it is undisputed that MassDEP has not taken any enforcement action, and thus enforcement and disputed issues of fact concerning enforcement are not at issue. Likewise, the Applicant suggests that I must resolve disputed issues of fact concerning, among other things: the extent to which G&U performed or directed the Project; whether G&U was authorized to perform the work; and whether G&U has actually used the Locus as a rail carrier for transportation purposes.

However, the only regulatory action at issue is MassDEP's issuance of the SDA. That was based upon a factual basis that is not genuinely contested by the parties. The SDA relied upon uncontested evidence demonstrating that in and around 2008 the Locus contained the identified wetland Resource Areas that were altered significantly overtime by someone who executed and implemented the Project. Nothing more needs be determined as the basis for issuance of the SDA, and the parties do not contend otherwise. Therefore, whether MassDEP's issuance of the SDA is preempted is appropriate for resolution by summary decision. And because it is a regulatory action, it must be reviewed pursuant to the above preemption standard to determine whether it is preempted. Although MassDEP suggests that the preemption analysis is "not ripe" for determination unless and until MassDEP formally takes an enforcement action, it came to that conclusion by performing a preemption analysis to assert that the SDA does not "unduly burden or unreasonably interfere with interstate commerce." MassDEP's Motion for Summary Decision, pp. 9-11.

MassDEP's issuance of the SDA and the SDA easily pass muster under the ultimate preemption inquiry: whether the regulatory action is being applied to unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce. The SDA does nothing more than confirm the undisputed facts that the identified wetland Resource Areas exist at the Locus and they were significantly altered beginning in about 2008, and up to the present time. There is no evidence in the administrative record concerning any other regulatory action by MassDEP, leaving only for adjudication whether the SDA and its issuance are preempted. Because the underlying material facts are not genuinely disputed the decision that there is no preemption has been appropriately adjudicated in this forum on summary decision, which should

be entered in favor of MassDEP and the Applicant, and against Gerrity, on the narrow issue whether the SDA and its issuance are preempted.

CONCLUSION

Given the undisputed absence of a restriction or burden on G&U from conducting its operations or engaging in interstate commerce, preemption does not apply to MassDEP's issuance of the SDA. As a consequence, summary decision should be entered in favor of MassDEP and the Applicant and against Gerrity, and the SDA should be affirmed.

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

Date: January 17, 2020

Timothy M. Jones
Presiding Officer

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Charles D. Baker
Governor

Karyn E. Polito
Lieutenant Governor

Kathleen A. Theoharides
Secretary

Martin Suuberg
Commissioner

February 24, 2020

In the Matter of
Hopedale Properties, LLC

Docket No. WET-2019-013
SDA
Hopedale, MA

FINAL DECISION

I adopt the Recommended Final Decision of the Presiding Officer. The parties to this proceeding are notified of their right to file a motion for reconsideration of this decision, pursuant to 310 CMR 1.01(14)(d). The motion must be filed with the Case Administrator and served on all parties within seven business days of the postmark date of this decision. A person who has the right to seek judicial review may appeal this decision to the Superior Court pursuant to M.G.L. c. 30A, §14(1). The complaint must be filed in the Court within thirty days of receipt of this decision.

Martin Suuberg
Commissioner

SERVICE LIST

Petitioner: Gerrity Companies Incorporated

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Applicant: Hopedale Properties LLC

Legal representative:
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Conservation Commission:
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Legal representative: None set forth in Petitioner's Appeal Notice

The Department:
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Certificate of Service

I hereby certify that I have this 16th day of July, 2021, caused to be served a copy of the foregoing Reply of Hopedale Properties, LLC, to the Petition of Grafton and Upton Railroad Company for Declaratory Order, upon the following party of record via electronic mail:

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Counsel for Grafton and Upton Railroad Company

Allison I. Fultz